CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS, AND W. CORRY SMITH, PARTNERS TRADING UNDER THE FIRM NAME OF E. JACK SMITH, CONTRACTOR, PETITIONERS,

vs.

COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS BOARD OF COUNTY TAX ASSESSORS OF FULTON COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1944.

CERTIORARI GRANTED APRIL 3, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 680

E. JACK SMITH, JACK CLARK, R. L. RIVERS AND W. CORRY SMITH, PARTNERS TRADING UNDER THE FIRM NAME OF E. JACK SMITH, CONTRACTOR, PETITIONERS,

vs.

COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS BOARD OF COUNTY TAX ASSESSORS OF FULTON COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1944.

[fol. 1]

IN THE SUPERIOR COURT OF FULTON COUNTY, GEORGIA

E. Jack Smith, Contractor,

vs.

Comer Davis et al., as Members of the Board of County Tax Assessors of Fulton County, Georgia, et al.

Bill of Exceptions—Filed June 2, 1943

To the Supreme Court of the State of Georgia:

Be it remembered that on May 14, 1943, during the May term, 1943, of the superior court of Fulton County, Georgia, there came on regularly to be heard before the Honorable Walter C. Hendrix, judge of said superior court then and there presiding, the demurrers filed on January 15, 1943; and on March 29, 1943, and on May 14, 1943, by Comer Davis, Reese Perry and John C. Townley, in their capacity as members of the Board of County Tax Assessors of Fulton County, Georgia, Guy Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, which tax officials are the defendants in the above entitled case.

Said action was an equitable proceeding instituted by E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers, as plaintiff in which equitable proceeding said E. Jack Smith, contractor, sought to enjoin the defendant tax officials from making any assessment against E. Jack Smith, contractor, by reason of its ownership of accounts receivable and of certificates of indebtedness described in the petition, for the calendar year 1942, and sought further to enjoin the defendant tax officials from entering said assessments or from issuing executions based thereon or from doing anything to force E. Jack Smith, contractor, to pay taxes on such accounts receivable and certificates of indebtedness.

Said E. Jack Smith, contractor, filed an amendment to [fol. 2] its said petition on March 29, 1943, and on the same day said defendants renewed their original demurrer to plaintiff's petition as so amended and filed a second de-

murrer on March 29, 1943, by which defendants renewed all of the general grounds of the original demurrer so filed by defendants, and in addition thereto demurred to the petition as so amended upon four new grounds added by said demurrer filed March 29, 1943, designated respectively as the 10th, 11th, 12th, and 13th grounds of the demurrer.

Thereafter on April 20, 1943, the plaintiff filed a second amendment to its petition as previously amended and the defendants on May 11, 1943, after the filing of plaintiff's second amendment, renewed their previous demurrers so filed on January 15, 1943, and on March 29, 1943, which demurrers were renewed and urged by defendants to plaintiff's petition as finally amended.

After consideration and argument of counsel said court, the Honorable Walter C. Hendrix, judge of said court then and there presiding, entered a judgment and order overruling all demurrers so filed by the defendants, namely, the demurrer filed January 15, 1943, the demurrer filed March 29, 1943, and the demurrer filed May 11, 1943, which demurrers were overruled by the court upon each and every ground thereof.

Said order dated May 14, 1943, overruling said demurrers was adverse to and against the contentions of the defendants, to which order the defendants then and there excepted and here and now except and assign the same as error.

Defendants Comer Davis, Reese Perry, and John C. Townley in their capacity as members of the board of tax assessors of Fulton County, Georgia, Guy A. Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, accordingly tender this bill of exceptions on this 1st day of June, 1943, within the time prescribed by law, naming themselves as plaintiffs in error and naming as defendant in error, E. Jack Smith, contractor, a partnership composed of E. Jack Smith, John Clark, W. Corry Smith, and R. L. Rivers, and also E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, the individual members of said partnership, and assign said order dated May 14, 1943, as error, on the ground that said judgment overruling said demurrers was and is contrary to law and on the ground that the court erred in overruling each ground contained in the demurrer filed January 15, 1943, and the demurrer filed March 29, 1943, and in overruling the demurrer filed May 11, 1943.

[fol. 3]

Plaintiffs in error specified as material to a clear understanding of the errors complained of the following portions of the record, to wit:

1. Plaintiffs' petition filed November 24, 1942.

2. Defendants' original demurrer filed January 15, 1943.

3. Plaintiff's first amendment filed March 29, 1943, together with exhibits thereto attached.

4. Defendants' second demurrer filed March 29, 1943.

5. Plaintiff's second amendment filed April 20, 1943.

6. Defendants' renewal of their demurrers filed May 11, 1943.

7. Final order on demurrers dated May 14, 1943.

Plaintiffs in error respectfully pray that this bill of exceptions be signed and certified and transmitted to the Supreme Court of the State of Georgia in order that the errors alleged to have been committed may be considered and corrected.

Plaintiffs in error aver that the Supreme Court of Georgia, and not the Court of Appeals, has jurisdiction because of the fact that the proceeding is an equitable proceeding and because the exception is to an order overruling a general demurrer in an equitable cause.

[fol. 4] This June 1st, 1943.

E. H. Sheats, Standish Thompson, W. S. Northcutt, Attorneys at law for Comer Davis, Reese Perry and John C. Townley in their capacity as members of the board of county tax assessors of Fulton County, Georgia, Guy Moore in his capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his capacity as tax collector of Fulton County, Georgia, as plaintiffs in error.

Address: 1403 C. & S. Nat. Bank Bldg., Atlanta, Georgia.

IN SUPERIOR COURT OF FULTON COUNTY

ORDER APPROVING BILL OF EXCEPTIONS—June 1, 1943

I do certify that the foregoing bill of exceptions is true and contains all the evidence and specifies all of the record, material to a clear understanding of the errors complained

of; and the clerk of the superior court of Fulton County, Georgia, is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

Walter C. Hendrix, Judge Superior Court, Atlanta Circuit.

June 1st, 1943.

Minutes 215 Page 336

Due and legal service of the foregoing bill of exceptions acknowledged; copy received. All other and further service and notice waived.

[fol. 5] Morgan Belser, Attorney at law for E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers; also attorney at law for E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, the individual members of said partnership.

June 1st, 1943.

[File endorsement omitted.]

[fol. 6] In Superior Court of Fulton County

Clerk's Certification to Bill of Exceptions—June 8, 1943

Georgia,

Fulton County:

I hereby certify, that the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, to wit:

Comer Davis et al., as members of the board of county tax assessors of Fulton County, Georgia, plaintiff in error vs. E. Jack Smith et al., Defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this the 8th day of June, 1943.

Cora M. Kennedy, Deputy Clerk Superior Court Fulton County, Georgia. Ex Officio clerk City Court of Atlanta. (Seal.)

[File endorsement omitted.]

[fol. 7] IN SUPERIOR COURT OF FULTON COUNTY

PETITION

GEORGIA,

Fulton County:

To the Superior Court of said County:

The petition of E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, respectfully shows the following:

1

That the defendants named herein are Comer Davis, Reese Perry, and John C. Townley, as the board of county tax assessors of Fulton County, Georgia; Guy Moore, as tax receiver of Fulton County, Georgia, and T. E. Suttles, as tax collector of Fulton County, Georgia.

2

Each of said defendants is a resident of Fulton County, Georgia.

3

Petitioner is a partnership composed of the individuals hereinabove set forth, having its principal office in Fulton County, Georgia.

4

Petitioner is now and at all times herein mentioned, has been in the contracting and construction business and in this connection furnished paving materials to and performed certain work in constructing public highways and United States Army Air Bases for the State of Georgia, various counties of Georgia and the United States Government.

5

On January 1, 1942, petitioner held and owned the following accounts due it by the County of Camden, Georgia, the State of Georgia, and the United States Government:

Camden County, Georgia	$ 1,102.14
State of Georgia	15,086.84
United States Government	29,831.10

[fol. 8] 6

In addition to the accounts set forth above, petitioner also at said time held and owned various certificates of indebtedness in the amount of $117,956.68 issued to it by the Highway Department of the State of Georgia.

7

Petitioner shows that the indebtedness owing to it by Camden County, Georgia, as hereinabove set forth, represented an open account due for furnishing paving materials and laying the same on a public highway in said county, which work had been commenced and completed within the year 1941, and performed under contract with Camden County.

8

Petitioner shows that the indebtedness owing to it by the State of Georgia, as hereinabove set forth, represented an open account due for grading, draining, paving, furnishing of paving materials, and constructing certain public highways in Liberty and Camden Counties, Georgia, which work was commenced and completed within the year 1941, and performed under contract with the State of Georgia.

9

Petitioner shows that the indebtedness owing to it by the United States Government, as hereinabove set forth, represented an open account due for furnishing paving materials, grading, draining and laying of paving materials in the construction of United States Army airports at Savannah, Georgia, which work was performed under contract with the United States Government, the amount of said indebtedness representing the amount due petitioner by the United States Government on January 1, 1942.

10

Petitioner shows that the certificates of indebtedness hereinabove referred to evidenced an indebtedness in said amount due to petitioner by the State of Georgia for work [fol. 9] done and performed by petitioner under contract with the said State of Georgia in furnishing paving materials to the State of Georgia, through the State Highway

Department of Georgia for use in constructing various public highways in the State of Georgia.

11

By reason of the various facts with respect to the nature of the indebtedness represented by said open accounts receivable and certificates of indebtedness, petitioner alleges that the same are not taxable in Fulton County or in the State of Georgia.

12

Notwithstanding the facts above alleged, the defendants constituting the board of county tax assessors of Fulton County, Georgia, have notified petitioner that unless it returns said accounts receivable and certificates of indebtedness for taxation, the defendants will assess said property and cause said assessment to be entered on the tax digest, and said defendants are threatening to assess such accounts receivable and certificates of indebtedness for ad valorem taxes for the State of Georgia and County of Fulton and to cause all such assessments to be entered on the tax digest of Fulton County, Georgia, for the year 1942 and to cause an execution to issue for such taxes, and said defendants are at present preparing such assessments and will, unless restrained and enjoined from so doing, make such assessments and have the same entered on the tax digest on November 24, 1942, and cause said execution when issued to be levied on the property of petitioner.

13

The defendant, Guy Moore, as tax receiver of Fulton County, Georgia, has notified petitioner that he will enter said tax assessment on the tax digest and is threatening [fol. 10] to enter upon the tax digest the assessment sought to be made by the defendants constituting the board of county tax assessors of Fulton County, Georgia, and at the present time is preparing to enter said assessment upon the tax digest and will do so unless restrained and enjoined therefrom.

14

Petitioner alleges that said accounts receivable and certificates of indebtedness are not subject to taxation by

Fulton County, Georgia, or by the State of Georgia, and that the threatened assessment thereon for taxation and the threatened taxation thereof would be without lawful authority and would be contrary to the constitutional rights of petitioner and would be in violation of the provisions of the Constitution of the State of Georgia because said threatened taxation, if carried out, would deprive petitioner of its property without due process of law, contrary to the provision of the constitution of the State of Georgia contained in article 1, section 1, paragraph 3, as follows: "No person shall be deprived of life, liberty, or property except by due process of law."

15

Petitioner further alleges that the threatened taxation of said accounts receivable and certificates of indebtedness, if carried out, would deprive petitioner of its property without due process of law contrary to the provisions of the constitution of the United States, contained in the fourteenth amendment as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

16

Petitioner alleges that the threatened taxation of said accounts receivable and certificates of indebtedness would [fol. 11] be violative of the constitutional provisions of the State of Georgia and of the United States Government as hereinabove set forth for the reason that said accounts receivable and certificates of indebtedness are instrumentalities of the United States of America, the State of Georgia and a governmental subdivision thereof and as such are not taxable property subject to taxation by the County of Fulton or the State of Georgia.

17

Petitioner alleges that it would suffer irreparable damage if the said defendants are permitted to carry out their threats and make assessments against petitioner and have the same entered on the tax digest or to cause executions to be issued against petitioner. Such action, if carried out, would cast a cloud upon the title of all property owned

by petitioner in Fulton County or the State of Georgia, and petitioner alleges that it owns valuable personal property located in said State and County.

18

Petitioner alleges that such action would seriously affect the salability of said property and would cause great inconvenience, annoyance and expense to petitioner because petitioner's said property at present is actually being used by petitioner in constructing runways and other pavement on United States army airports under contract with the United States Government, and because for other reasons there is no provision of law in Georgia by which taxes can be paid under protest and then recovered, and there is no provision of law in such cases where assessments are made by the board of county tax assessors for taxpayers to contest the taxability of the property so assessed and under the laws of Georgia an affidavit of illegality does not lie against the enforcement of a tax lien for State and County taxes.

[fol. 12] 19

Petitioner alleges that if the defendants are not restrained and enjoined, they will proceed to make the assessments as threatened, the tax receiver will enter the same on the tax digest and the tax collector will issue execution and cause the same to be levied on the property of this petitioner.

20

Petitioner has no full, complete, and adequate remedy at law and will suffer irreparable damage unless the defendants are restrained and enjoined as herein prayed.

Wherefore, waiving discovery, petitioner prays:

1. That process issue requiring the said defendants and each of them to be and appear at the next term of this court to answer petitioner's complaints.

2. That a rule nisi be granted requiring the said defendants to show cause before the non-jury division of this court why they should not be enjoined from making any assessment against petitioner on the accounts receivable and certificates of indebtedness referred to in said petition and by the defendants, the tax receiver and the tax collector, should

not be enjoined from entering said assessments against petitioner and from issuing execution based on such assessment, and from doing anything to force petitioner to pay taxes on such accounts receivable and certificates of indebtedness as are set forth in the petition and which the defendants are threatening to assess and attempt to collect taxes on as set out in said petition, and that upon an interlocutory hearing said defendants and each of them be enjoined in the respects above set out.

3. That, in the meantime and until interlocutory hearing can be had, the defendants and each of them be restrained from doing any of the things for which injunction is prayed in the preceding paragraph.

[fol. 13] 4. That petitioner be granted such other and further relief as may be necessary to protect petitioner and to which it may be entitled in the premises.

Morgan Belser, Attorney for Petitioner.

Duly sworn to by R. L. Rivert. Jurat omitted in printing.

[fol. 14] In Superior Court of Fulton County

Temporary Restraining Order—November 24, 1942

The within and foregoing petition has been read and considered. Let the same be filed. Let the defendants and each of them be served with a copy of the foregoing petition and of this order.

Let the defendants show cause before the judge presiding in the non jury division of the Court on the 27th day of November, 1942, at 10:00 o'clock a. m., why the prayers of the said petition should not be granted.

In the meantime and until further order of the court, the defendants and each of them are expressly restrained from doing any of the acts for which temporary injunction is prayed in the foregoing petition.

This 24th day of November, 1942.

Edgar E. Pomeroy, Judge S. C. A. C.

[fol. 15] In Superior Court of Fulton County

[Title omitted]

Summons and Return

To the Sheriff or His Deputy, of said County, Greeting:

The defendants are hereby required, personally or by attorney, to be and appear at the superior court, to be held in and for said County, on the first Monday in January, 1943, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable John D. Humphries, Judge of said court, this 24th day of November, 1942.

D. W. Brown, Deputy Clerk.

Filed in office, this the 24 day of Nov. 1942.

D. W. Brown, Deputy Clerk.

Due and legal service of a copy of the foregoing petition and process and of the restraining order thereon is hereby acknowledged, and all other and further service is waived. This November 24, 1942.

Guy Moore, as tax receiver of Fulton County, Georgia: Guy A. Moore, tax recvr., by Jason A. Taggle, Chief Deputy; T. E. Suttles, as Tax Col-
[fol. 16] lector of Fulton County, Georgia, by T. E. Suttles.

Comer Davis, Reese Perry, and John C. Townley, as members of the board of tax assessors of Fulton County, Georgia. Comer Davis, by R. Perry, John C. Townley.

[fol. 17] In Superior Court of Fulton County

[Title omitted]

Demurrer—Filed January 15, 1943

Now come Comer Davis, Reese Perry and John C. Townley in their capacity as members of the board of tax asses-

sors of Fulton County, Georgia, Guy Moore in his official capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles, in his official capacity as tax collector of Fulton County, Georgia, defendants in the above case, and respectfully demur to plaintiff's petition and to portions herein specified, upon each of the following grounds:

1st

Because the petition sets forth no cause of action against the defendants, or either of them.

2nd

Because there is no equity in the bill.

3rd

Because the petition fails to disclose any reason why the accounts described in paragraph five of the petition, or either of them, are not subject to tax in Fulton County, Georgia.

4th

Defendants demur to the last clause of paragraph seven of the petition and to all portions relating to an alleged contract with Camden County, on the ground that no copy of the alleged contract is incorporated in the petition or attached as an exhibit thereto.

5th

Defendants demur to the last clause of paragraph eight [fol. 18] of plaintiff's petition and to all portions thereof relating to an alleged contract with the State of Georgia, on the ground that said alleged contract is not incorporated in the petition or attached thereto as an exhibit.

6th

Defendants demur to the last clause of paragraph nine of the petition beginning with the words "which work was" and continuing through the remainder thereof, and to all portions of the petition relating to an alleged contract with the United States Government, on the ground that no copy of said contract is incorporated in the petition or attached thereto as an exhibit.

7th

Defendants demur to that portion of paragraph ten of the petition referring to an alleged contract with the State of Georgia on the ground that no copy of said contract is incorporated in the petition or attached thereto as an exhibit.

8th

Defendants demur to the allegations of paragraph fourteen of the petition relating to the alleged unconstitutionality of the threatened assessment and the threatened taxation of petitioner's accounts on the ground that neither said paragraph nor the petition disclose any legal reason why such assessment and such taxation would deprive petitioner of its property without due process of law, and on the ground that the allegations of said paragraph seek only to invoke an alleged constitutional right by reference only to a clause of the constitution of Georgia without setting forth the reason or the basis of said attack or any facts which disclose lack of due process in the conduct of the defendants complained of.

9th

Defendants demur to the allegations of paragraph fifteen of the petition relating to the alleged unconstitutionality [fol. 19] of the threatened taxation of accounts receivable and certificates of indebtedness, on the ground that neither said paragraph nor the petition disclose any legal reason why such threatened taxation, if carried out, would deprive petitioner of its property without due process of law, or deprive petitioner of any right to which petitioner is entitled under the fourteenth amendment to the constitution of the United States, and on the ground that the allegations of said paragraph seek only to invoke an alleged constitutional right by reference only to a clause of the constitution of the United States without setting forth the reason or the basis of said attack, or any facts which disclose lack of due process or equal or denial of equal protection on account of any act threatened by either of defendants to this suit.

Wherefore, defendants pray that this demurrer be sustained upon each and every ground thereof, that all portions of the petition herein specially demurred to be stricken and eliminated from the petition, that plaintiff's petition be dis-

missed, and that defendants have judgment for all costs in this behalf incurred.

E. H. Sheats, County Attorney; W. S. Northcutt, Assistant County Attorney; ——, Assistant County Attorney; Standish Thompson, Attorney at Law, Attorneys at Law for Defendants.

[File endorsement omitted.]

[fol. 20] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO PETITION—March 29, 1943

Comes now E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith, and R. L. Rivers, and by leave of the court first had and obtained, amends the petition heretofore filed in said case as follows:

1

Petitioner amends paragraph 6 of said petition by adding thereto the following to be known as paragraph 6 (a):

6(a). The said certificates of indebtedness were issued in accordance with the act of the General Assembly of Georgia approved February 26, 1941 (Ga. Laws 1941, page 596).

2

Petitioner amends paragraph 7 of said petition by adding thereto the following to be known as paragraph 7 (a):

7 (a). The said contract was not in writing but was an oral contract entered into on or about July 10, 1941, by and between petitioner and the board of commissioners of Camden County, Georgia, acting by and through its chairman, N. C. Brown, under the terms of which contract it was agreed by and between the parties that petitioner would construct a public highway in said county and in this connection, would furnish work, labor and materials as follows: (1) Prepare base by grading 2152 square yards at 3½c per square yard; (2) 2152 square yards six inch compacted sand bituminous stabilized road-bed at 11c per square yard;

and (3) 10,062 gallons of bituminous material (asphalt) at 9c a gallon, and for which work, labor and materials the said Camden County would pay petitioner the sum of [fol. 21] $1,217.62, computed as aforesaid, less the sum of $115.48, representing a credit on account of petitioner's use of said county's equipment. Although said work was done and said materials furnished prior to January 1, 1942, payment therefor was not made until after said date, and, accordingly the said items represented an open account receivable in the amount of $1,102.14 due petitioner on January 1, 1942.

3

Petitioner amends paragraph 8 of said petition by adding thereto the following to be known as paragraph 8 (a):

8 (a). The work, labor and materials furnished by petitioner to the State of Georgia as herein alleged were furnished in accordance with the terms of a written contract executed October 8, 1941, by and between the State Highway Board of Georgia, and petitioner, a copy of which contract is attached hereto, marked Exhibit A, to which reference is prayed as often as may be necessary. On January 1, 1942, there was due petitioner by the State of Georgia a balance of $15,086.84, for work, labor and materials furnished in pursuance of said contract and said amount represented an open account receivable due petitioner on said date.

4

Petitioner amends paragraph 9 of said petition by adding thereto the following to be known as paragraph 9 (a):

9 (a). The work, labor and materials furnished by petitioner to the United States Government were furnished for the purpose of and in connection with the construction of two airports or bases located at Savannah, Georgia, for the use of the United States Army. The said army airports were designated as the Savannah Municipal Airport No. 2, and the Savannah Air Base.

The work, labor and materials furnished by petitioner in connection with the construction of said Savannah Munici- [fol. 22] pal Airport No. 2 were furnished in pursuance of the terms of a written contract executed by the United States of America and E. Jack Smith, contractor, dated

June 16, 1941, and approved June 30, 1941, a copy of which contract is attached hereto and marked exhibit B, to which reference is prayed as often as may be necessary.

The work, labor and materials furnished by petitioner in connection with the construction of the said Savannah Air Base were furnished in pursuance of the terms of a written contract executed by the United States of America and E. Jack Smith, contractor, dated June 24, 1941, and approved July 12, 1941, a copy of which contract is attached hereto, marked exhibit C, to which reference is prayed as often as may be necessary.

For the work, labor and materials furnished by petitioner to the United States of America in pursuance of the terms of said contracts, there was due petitioner by the United States of America on January 1, 1942, the sum of $29,831.10, representing the balance due under the terms of said contracts. The balance aforesaid was in the nature of an open account and represented an account receivable in the hands of petitioner on said date.

5

Petitioner amends paragraph 10 of said petition by adding thereto the following to be known as paragraph 10 (a):

10 (a). The said Highway Department of Georgia contracted for such materials by inviting bids from contractors engaged in furnishing such materials and by awarding contracts to those making the lowest bid. The procedure for letting such contracts by bids was as follows: The supervisor of purchases of the State of Georgia, in accordance with the act of the General Assembly of Georgia, approved March 24, 1939, (Georgia Laws 1939, page 167), mailed to all [fol. 23] contractors, including petitioner, an invitation to submit bids for a specific quantity, grade and type of materials to be furnished in the construction of a highway designated by project number and county. In response to such invitations, said contractors, including petitioner, submitted bids on the work and materials specified in the invitations. Upon the opening of the bids, the State supervisor of purchases awarded the contract to the contractor submitting the lowest bid. Thereafter, as the work on the specified project progressed and from time to time thereafter as the materials were required for use on said project the supervisor of purchases of the State of Georgia issued

to such low bidder a purchase order or purchase orders requiring delivery of such materials. A typical example of the procedure followed in contracting with petitioner for the furnishing of paving materials represented by said certificates of indebtedness was as follows:

On June 25, 1940, the supervisor of purchases of the State of Georgia, in accordance with the act of the General Assembly of Georgia, approved March 24, 1939, mailed to petitioner a letter commonly known and referred to as an invitation to bid, which letter invited petitioner to bid an approximately 7,000 tons of hot plant sand asphalt seal to meet section 145 of the State Highway specifications and reciting that bids would be received until 11:00 o'clock a. m. central daylight saving time July 10, 1940, a copy of which letter or invitation is attached hereto, marked exhibit D, to which reference is prayed as often as may be necessary. In response to said invitation, petitioner, on July 10, 1940, submitted his bid on the form prescribed by the said act of the General Assembly approved March 24, 1939, wherein he offered to furnish said materials upon the terms specified, at $4.45 per ton, a copy of which bid is attached hereto, marked exhibit E, to which reference is prayed as often as may be necessary. Thereafter on July 15, 1940, the super- [fol. 24] visor of purchases of the State of Georgia issued to petitioner the State's purchase order No. 9511, requiring delivery of a portion of the material referred to in said invitation and bid, a copy of which purchase order is attached marked exhibit F, to which reference is prayed as often as may be necessary.

All of the transactions by and between petitioner and the State Highway Board of Georgia relating to the certificates of indebtedness hereinabove referred to were identical in form with the invitation, bid and purchase order aforesaid, except as to the date, project numbers, quantities and price and all of said invitations, bids and purchase orders being in the forms prescribed by the laws of Georgia.

After the delivery of said materials, the State Highway Department of Georgia, so long as funds were available for such purposes, paid to petitioner monthly for the materials furnished and delivered during the preceding month. At the time that said State Highway Department of Georgia was indebted to petitioner for such materials in various sums aggregating the principal sum of $117,050.68, the said

highway department being without funds sufficient to liquidate said indebtedness, thereupon issued to petitioner various certificates of indebtedness aggregating the said principal sum of $117,050.68, which said certificates of indebtedness were issued in accordance with the provisions of the act of the General Assembly of Georgia approved Feb. 26, 1941 (Ga. Laws 1941, page 596).

6

Petitioner amends paragraph 3 of the petition by adding thereto the following:

"On January 1, 1942, and at all times since, each of the partners was and is a resident of Fulton County, Georgia, except W. Corry Smith, who was and is a resident of Hamilton County, Tennessee.

Morgan Belser, Attorney for plaintiff.

[fol. 25] EXHIBIT "A" TO AMENDED PETITION

Contract

This Agreement, made and entered into this 8th day of October, one thousand nine hundred and forty-one, by and between the State Highway Department of Georgia, party of the first part (hereinafter called the State) and E. Jack Smith, Atlanta, Georgia, party of the second part (hereinafter called Contractor), Witnesseth:

Whereas, the State desires the improvement and construction of a certain road hereinafter more particularly described and the contractor desires to furnish and deliver all the material and to do and perform all the work and labor for said purpose:

Now, therefore, in consideration of the promises, the mutual covenants herein contained and the sum of one dollar ($1.00) by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. The contractor promises and agrees to furnish and deliver all the material and to do and perform all the work and labor required to be furnished and delivered, done and performed in and about the improvement and construction

of 4.535 Miles of paving on the Midway to Dorchester Road. Beginning in Midway and extending toward Dorchester. Otherwise known as Federal Aid Secondary Project No. FAS 2677-B (1) Parts 1 and 2 in Liberty County, in strict and entire conformity with the provisions of this contract, and the notice to contractors and proposals, and the plans and specifications prepared (or approved) by the State Highway Engineer (or his authorized representative), the originals of which are on file in the office of the State Highway Engineer, copies of which are hereto attached, and which said plans and specifications and the notice to contractors and the proposal are hereby made a part of this agreement as fully and to the same effect as if the same had been set forth at length in the body of this agreement.

2. The State agrees and promises to pay to the contractor for said work, when completed in accordance with the provisions of this contract the price as set forth in the said proposal amounting approximately to fifty-nine thousand, seven hundred forty & 23 100 dollars ($59,740.23) payments to be made as provided in said specifications upon presentation of the proper certificates of the State Highway Engineer or his representatives and upon the terms set forth in the said specifications and pursuant to the terms of this contract.

3. The said work shall be done in accordance with the laws of the State of Georgia under the direct supervision, and to the entire satisfaction of the State Highway Department, subject at all times to the inspection and approval of the Secretary of Agriculture, or his agents, and in accordance with the rules and regulations made pursuant to that certain Act of the Federal Congress entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes," approved July 11, 1916, and amendments subsequent thereto.

4. The decision of said State Highway Engineer upon any question connected with the execution of this agreement or any failure or delay in the prosecution of the work by the said contractor shall be final and conclusive.

[fol. 26] In Witness Whereof the State Highway Department of Georgia, has caused these presents to be executed by It's Chairman Who has been duly authorized thereto by the State Highway Board of Georgia, and E. Jack Smith,

Atlanta, Georgia, the contractor, has hereto set his hand and seal this the day and year above written.

State Highway Board of Georgia. By W. W. Simms, Chairman. Executed by State Highway Board this the day of Oct. 8, 1941. E. Jack Smith, Contractor. By E. Jack Smith.

Witness for the State M. C. B. Holley, Roy A. Flynt. Witness for the Contractor I. Huline, I. M. Harrison. Approved this day of Oct. 7, 1941. State Highway Board of Georgia. M. T. Thadburn, State Highway Engineer.

[fol. 27] EXHIBIT "B" TO AMENDED PETITION

File No. CA 205/3

Contract No. CCA 4641 (W819-eng-838)

Contract
(Construction)

DEPARTMENT OF COMMERCE
Civil Aeronautics Administration
represented by
United States Engineer Office
Savannah, Georgia
(Department)

E. Jack Smith
Atlanta, Ga.
(Contractor)

Contract for paving runways, taxiways and aprons at Savannah Municipal Airport No. 2. Amount, Approximately $175,140.22. Place Savannah, Georgia.

Payments will be made by the Civil Aeronautics Administration, Accounts Division, Department of Commerce, Washington, D. C.

[fol. 28] Contract for Construction.

This Contract, entered into this 16th day of June, 1941, by The United States of America, hereinafter called the Government, represented by the contracting officer exe-

cuting this contract, and E. Jack Smith, an individual trading as E. Jack Smith, of the city of Atlanta in the State of Georgia, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Article 1. *Statement of work.*—The contractor shall furnish the plant, materials, and labor, and perform the work for paving runways, taxiways and aprons and installing electric service ducts at Savannah Municipal Airport No. 2 as set forth and described in paragraph 1-02 of the specifications for the consideration of an amount to be determined from work done and materials, etc., furnished in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications dated Savannah, Georgia, May 19, 1941, marked "Invitation No. 819-41-141", consisting of eighty (80) paragraphs; Schedule of Prices marked "Insert No. 1"; and drawings listed in paragraph 1-03 of the specifications. The work shall be commenced within ten (10) calendar days after the date of receipt by the contractor of notice to proceed, and shall be completed within one-hundred and twenty (120) calendar days from the date of receipt of said notice to proceed as provided in paragraph 1-05 of the specifications.

[fol. 29] Article 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties

make changes in the drawings and or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and, if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and or difference in time resulting from such conditions.

Article 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and or construction and at any and all places where such manufacture and or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises. If the contractor fails to proceed at once with the replacement of rejected material and or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said article 9 for terminations thereunder.

[fol. 30] (*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily in-

volved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to [fol. 31] determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the de-

partment or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. *Eight-hour law—Overtime compensation—Convict labor.* (*a*) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation

computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5(b) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

[fol. 32] Article 12. *Covenant against contingent fees.*—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

[fol. 33] Article 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the

contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however*, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further*, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor

from the operation of the release in stated amounts to be set forth therein.

Article 17. *Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).—

(*a*) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(*b*) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid [fol. 34] as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Article 18. *Domestic preference.*—In the performance of the work covered by this contract the contractor, subcontractors, material men or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41, section 10b).

Article 19. *Nonrebate.*—(*a*). The contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Register of March 1, 1941, 6 F. R. 1211, or any modification thereof pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276b and 276c), sworn to by the contractor or the subcontractor concerned or by the authorized officer or employee of the contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the contractor or such subcontractor from the full weekly wages earned as set out on such pay roll; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly,

from the full weekly wages earned as set out on such pay roll.

(*b*) The contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(*c*) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

[fol. 35] Article 20. *Additional security.*—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 21. *Definitions.*—(*a*) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(*b*) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

[fol. 36] Article 22. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: Article 1, first line, the words "plant," and "and labor" were inserted. Article 11, deleted and revised Article 11 substituted therefor. Article 19, deleted and revised Article 19 substituted therefor. Article 23 added. Article 24 added.

Article 23. The amount of one-hundred and sixty-four thousand dollars ($164,000) has been allotted for work under this contract. The appropriation and allotment of

additional funds is expected. However, if additional funds are not made available, this contract may be terminated upon the expenditure of available funds without liability on the part of the United States by reason of such termination and the reduction in the work made necessary thereby shall be as directed by the contracting officer.

Article 24. *Approval.* This contract shall be subject to the written approval of the Division Engineer, South Atlantic Division, and shall not be binding until so approved.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved Jun. 30, 1941.

The United States of America, by F. W. Altstuetter, Col., Corps of Engineers, Deputy Contracting Officer, Civil Aeronautics Administration. E. Jack Smith, Contractor, 756 Hurt Bldg., Atlanta, Ga.

J. S. Bragdon, Lieut. Col., Corps of Engineers, Division Engineer, South Atlantic Division.

Two witnesses: I. Hulme, C. B. Verderf.

[fol. 37] EXHIBIT "C" TO AMENDED PETITION

File No. A. F. 305.1

Contract No. W819-eng-841

Contract

(Construction)

War Department, United States Engineer Office, Savannah, Georgia (Department)

E. Jack Smith, 756 Hurt Building, Atlanta, Georgia (Contractor)

Contract for stabilizing Parking Areas at Savannah Air Base, Savannah, Georgia. Amount, Approx. $187,733.00. Place Savannah, Georgia.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authorities shown

below, for Construction of Buildings, Utilities and appurtenances at Military Posts—No Year, the available balance of which is sufficient to cover the cost of same:

Eng.—798 P 99 A.—0540-12

Payments will be made by the Finance Officer, U. S. Engineer Office, Savannah, Georgia.

[fol. 38] Contract for Construction

This Contract, entered into this 24th day of June, 1941, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and E. Jack Smith, an individual trading as E. Jack Smith, of the city of Atlanta, in the State of Georgia, hereinafter called the contractor; witnesseth that the parties hereto do mutually agree as follows:

Article 1. *Statement of work.*—The contractor shall furnish all plant, equipment, labor, and the materials, and perform the work for the construction and completion of soil-cement and bituminous stabilized parking areas; installing storm drainage system, tie-down anchors, and electrical and water services at the Savannah, Georgia, Air Base for the consideration of an amount to be determined from work and materials, etc., furnished in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications marked "Invitation No. 819-41-163" consisting of one hundred two (102) paragraphs; Addenda No. I (in two sheets) and No. II (in one sheet); Schedule of Prices marked "Insert No. 1," page 2(a) hereof; and drawings listed in paragraph 1-03 of the specifications.

The work shall be commenced within five (5) calendar days after receipt by the contractor of notice to proceed and shall be completed within sixty (60) calendar days after receipt of the said notice to proceed.

[fol. 39] Article 2. *Specifications and drawings.*—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be

of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications; or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering

in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. *Inspection.*—(*a*) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said article 9 for terminations thereunder.

[fol. 40] (*b*) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as de-

scribed in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(*c*) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(*d*) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. *Materials and workmanship.*—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for

his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. *Superintendence by contractor.*—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be [fol. 41] impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as

set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, with the approval of the head of the department or his duly authorized representative, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. *Permits and care of work.* The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour law—Overtime compensation—Convict labor. (a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar

day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*, That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as in part modified by the provisions of Section 5(*b*) of Public Act No. 671, 76th Congress, approved June 28, 1940, and Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

[fol. 42] Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor

shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

[fol. 43] Article 14. *Officials not to benefit.*—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. *Payments to contractors.*—(a) Unless otherwise provided in the specifications partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however*, That the contracting officer, at any time, after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further*, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Gov-

ernment, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. *Rate of wages* (in accordance with the act of August 30, 1935, 49 Stat. 1011 (U. S. Code, title 40, sections 276a and 276a-1), this article shall apply if the contract is in excess of $2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union or the District of Columbia).—

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by

such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

"(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written [fol. 44] notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Article 18. *Domestic preferred.* In the performance of the work covered by this contract the contractor, subcontractors, material men or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. The foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured, as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the department under the proviso of title III, section 3, of the act of March 3, 1933, 47 Stat. 1520 (U. S. Code, title 41 section 10b).

Article 19. *Noncollusion.*—(a) The contractor shall furnish to the Government representative in charge at the site of the work covered by this contract, or if no Government representative is in charge at the site, shall mail to the Federal agency contracting for the work, within 7 days after the regular payment date of each and every weekly pay roll, an affidavit in the form prescribed by regulations issued by the Secretary of Labor and published in the Federal Regis-

ter of March 1, 1941, 6 F. R. 1211, or any modification thereof, pursuant to the act of June 13, 1934, 48 Stat. 948 (U. S. Code title 40, sections 276b and 276c), sworn to by the contractor or the subcontractor concerned, or by the authorized officer or employee of the contractor or subcontractor supervising such payment, to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the pay roll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the contractor or such subcontractor from the full weekly wages earned as set out on such payroll; and that no deductions, other than permissible deductions as defined in the said regulations pursuant to said act of June 13, 1934, and as described in said affidavit, have been or will be made, either directly or indirectly, from the full weekly wages earned as set out on such pay roll.

(b) The contractor shall comply with all applicable requirements of the said regulations of the Secretary of Labor under the act of June 13, 1934, and the requirements of this article of the contract shall be subject to all applicable provisions of such regulations.

(c) The contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure fulfillment of the requirements of this article.

[fol. 45] Article 20. Additional security. Should any surety upon the bond for the performance of this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 21. Definitions.—(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his authorized representative.

[fol. 46] Article 22. *Alterations.* The following changes were made in this contract before it was signed by the parties hereto:

Article 4. The words "all plant, equipment, labor and" inserted.

Article 11. Deleted in its entirety and revised Article 11 substituted therefor.

Article 19. Deleted in its entirety and revised Article 19 substituted therefor.

Article 23. Added.

Article 23. *Approval.* This contract shall be subject to the written approval of the Division Engineer, South Atlantic Division, and shall not be binding until so approved.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Approved Jul. 12, 1941.

The United States of America, by F. W. Altstaetter, Col., Corps of Engineers, District Engineer (Official title). E. Jack Smith, Contractor, 756 Hurt Building, Atlanta, Georgia (Business address).

J. S. Bragdon, Col., Corps of Engineers, Division Engineer, South Atlantic Division.

Two witnesses: Robert L. Rivers, M. S. Vines, Notary Public, Georgia, State at Large. My commission expires December 12, 1941.

[fol. 474] EXHIBIT "D" TO AMENDED PETITION

Atlanta, Georgia,
June 25, 1940.

GENTLEMEN:

Re: Requisition M-864
Project 1803-A (1)
Crawford County
Roberta to Route 3

Sealed bids will be received by the State Purchasing Department, Room 141, State Capitol, Atlanta, Georgia, until 11:00 a. m., Central Daylight Saving Time, July 10, 1940, for furnishing the following material f. o. b. State spreaders on the above project:

Approximately 7,000 tons hot plant sand asphalt seal, section 145, State Highway specifications, with minimum of 20% aggregate retained on 10 mesh sieve.

Quantities are approximate only and may be increased or decreased at the discretion of the supervisor of purchases. The supervisor of purchases reserves the right to reject any or all bids and to waive all formality.

After bids have been received and awards made, purchase orders will be issued for 2500 tons only, as directed by the State Highway Board.

The enclosed affidavit and proposal must be properly executed and returned with bid. Please mark envelope "Sealed bid for Highway Division to be opened July 10, 1940, at 11:00 a. m."

This notice is in accordance with the act of the General Assembly of Georgia, approved March 24, 1939.

Yours very truly, O. C. Glover, Supervisor of Purchases; C. H. Kilpatrick, Asst. Supervisor of Purchases.

CHK:G.
Encl.

[fol. 48] EXHIBIT "E" TO AMENDED PETITION

Notice to Bidders

Bidders, please note the following affidavit which is to be executed by each bidder and returned with the enclosed proposal:

Req. M-864, Proj. 1803-A (1).
Crawford County.

Date July 10, 1940.

Roberta to Route No. 3.

Proposal

Proposal of E. Jack Smith, contractor, of Atlanta, Georgia, for furnishing the following material (material or equipment):

A. 7,000 tons Hot Plant Sand Asphalt Seal, section No. 145, State Highway specs. with minimum of 20% aggregate retained on 10 mesh sieve $4.45 per ton to be delivered 15 Crawford County, Georgia, F. O. B. state spreaders on above project.

To State Highway Board of Georgia (Department, Board, Agency, etc.).

Sirs: The following proposal is made on behalf of E. Jack Smith, contractor (names of those interested) and no other. Evidence of my authority to submit the proposal is herewith furnished. The proposal is made without collusion on the part of any person, firm, or corporation.

The following is my itemized proposal: (See attached sheet for itemized proposal).

It is understood and agreed that I have read State Highway Board of Georgia (Department, Agency, Board, Bureau, etc.).

Specifications dated ——, ——, and understood that this proposal is made in accordance with the provisions of said specifications, and that said specifications are made a part of this proposal as completely as if the same were attached thereto. It is understood and agreed that this proposal is one of several competitive bids made to this State [fol. 49] Highway Board of Georgia (Department, Board, etc.) and in consideration of the mutual agreements of the bidders, similar hereto, and in consideration of the sum of one dollar cash in hand paid, receipt whereof is hereby acknowledged, the undersigned agrees that this proposal shall

be an option, which is hereby given by the undersigned to the State Highway Board of Georgia (Department, Board, Agency, etc.) to accept or reject this proposal at any time within thirty days from the date on which this sealed proposal is opened and read, and, in consideration of the premises, it is expressly covenanted and agreed that this proposal is not subject to withdrawal by the proposer or bidder, during the terms of said option. There is attached hereto properly executed an affidavit showing that this bidder has no interest, directly or indirectly in any other bid or proposal for said material (material or equipment) and that this bidder will not receive any commission, directly or indirectly, on the sale of said material (material or equipment) in the event some other person, firm or corporation should be declared low bidder for said material (material or equipment).

Witness my hand and seal this the 10th day of July, 1940.

Terms: ——.

Discount: ——.

(Signature) E. Jack Smith, Contractor (L. S.), Address 736 Hurt Bldg., Atlanta, Ga.

Affidavit

STATE OF GEORGIA,
County of Fulton:

Before me, an officer of said State, authorized by law to administer oaths personally came E. Jack Smith who on oath says that the attached proposal is submitted independently of any other bid or proposal, and that this bidder has no interest, directly or indirectly, in any other bid or [fol. 50] proposal for said material (material or equipment) and that this bidder will not receive any commission or any sum whatsoever, directly or indirectly, on the sale of said material (material or equipment) in event some other person, association, firm or corporation should be declared low bidder or awarded the contract or sale of said material (material or equipment).

E. Jack Smith, Affiant.

Sworn to and subscribed before me this the 10th day of July, 1940. M. S. Vines, Notary Public, Georgia State at Large. My commission expires December 12, 1941.

Notary Public or other officer authorized to administer oaths.

(Here follows 1 photolithograph, side folio 51)

EXHIBIT F TO AMENDED PETITION

Form HD 46 GO Barfield 39

PURCHASE ORDER
FOR VENDOR

Supervisor of Purchases

DATE July 15, 1940

STATE OF GEORGIA
Highway Division
ATLANTA

Nº 9511 G. O.

Issued to E. Jack Smith, Contractor, Atlanta, Ga.

For the following items to be shipped to STATE HIGHWAY BOARD OF GEORGIA

Care of D. B. Thompson

Destination

Notify at

Via **PREPAID** F. O. B. State spreaders on project Delivery

NOTICE TO VENDOR. Transportation charges must be prepaid on all shipments unless otherwise specified. As soon as shipment is made mail invoice in triplicate showing above order number to State Highway Board of Georgia, Office 110, No. 2 Capitol Square, Atlanta, Georgia. Vendor must furnish delivery receipt with invoice certifying that this order has been filled in accordance with specifications, in compliance with House Bill Number 310, Approved March 24, 1939.

ALL MATERIAL TO MEET STATE HIGHWAY SPECIFICATIONS

ANTITY	DESCRIPTION	UNIT PRICE	TOTAL	D C	TOTAL NET
Approx 2500	Tons Hot Plant Sand Asphalt ~~Mix~~, Seal, to meet Ga. State Highway Specifications, section 145 with minimum of 20% aggregate retained on 10 mesh sieve	4.45 ton			11,125.00

Notice to Vendor: Do not make shipment until instructions are received from the Engineer on the project.

...be shipped to STATE HIGHWAY BOARD OF GEORGIA

Care of D. B. Thompson

Destination

Notify at

Via PREPAID F. O. B. State spreaders on project Delivery

NOTICE TO VENDOR Transportation charges must be prepaid on all shipments unless otherwise specified. As soon as shipment is made mail invoice in triplicate showing above order number to State Highway Board of Georgia, Office 116, No. 2 Capitol Square, Atlanta, Georgia. Vendor must furnish delivery receipt with invoice certifying that this order has been filled in accordance with specifications, in compliance with House Bill Number 310, Approved March 24, 1939.

ALL MATERIAL TO MEET STATE HIGHWAY SPECIFICATIONS

QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL	D C	TOTAL NET
Approx 2500 Tons	Hot Plant Sand Asphalt Surf, Seal, to meet Ga. State Highway Specifications, section 145 with minimum of 20% aggregate retained on 10 mesh sieve	4.45 ton			11,125.00

Notice to Vendor: Do not make shipment until instructions are received from the Engineer on the project.

Unit 6

Project Asph. 1803-A (1) Roberta to Route 3

Account Constr. Direct

Req. No. 11-364

Submit invoice in triplicate showing order number as soon as shipment is made.

TERMS 30 days unless otherwise specified hereon.

DELIVERY At once unless otherwise specified hereon.

No. 9511 G. O.

STATE OF GEORGIA

By

Supervisor of Purchases

[fol. 52] *Duly sworn to by E. Jack Smith. Jurat omitted in printing.*

IN SUPERIOR COURT OF FULTON COUNTY

ORDER ALLOWING AMENDMENT TO PETITION—March 29, 1943

The within and foregoing petition is hereby allowed and ordered filed subject to objection and demurrer. This March 29, 1943.

Walter C. Hendrix, Judge, Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 53] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AMENDED PETITION—Filed March 29, 1943

Now come Comer Davis, Reese Perry, and John C. Townley, in their capacity as members of the Board of Tax Assessors of Fulton County, Georgia, Guy Moore in his official capacity as tax receiver of Fulton County, Georgia, and T. E. Suttles in his official capacity as tax collector of Fulton County, Georgia, and each at the same term of court after the filing and allowance of an amendment to plaintiff's petition, respectfully renew their original demurrer which was filed on March 29, 1943, to the plaintiff's petition, as amended, upon all the general grounds thereof, and respectfully urge grounds 1st, 2nd, 3rd, 8th and 9th of their original demurrer to the plaintiff's petition as amended and ask that plaintiff's petition as amended be dismissed for all of the reasons set forth in said grounds of the general demurrer heretofore filed.

Defendants also demur to the petition as amended on the following grounds:

10th

Because it appears from the petition that each species of property owned by petitioner and described in the peti-

tion was taxable property, subject to ad valorem tax in Fulton County, Georgia, for the year 1942, and property which the constitution and laws of Georgia requires to be taxed to petitioner.

11th

Defendants demur separately to those portions of the petition relating to accounts due petitioner by Camden County, the State of Georgia and the United States Govern-
[fol. 54] ment, and to those portions of the petition relating to certificates of indebtedness issued to petitioner by the Highway Department of the State of Georgia, and separately to all portions of the petition relating respectively to indebtedness owing to petitioner by Camden County and by the State of Georgia and by the United States Government, upon each of the following grounds:

(a) Because said portions of the petition set forth no cause of action nor part of a cause of action against the defendants or either of them.

(b) Because it affirmatively appears from the petition that the respective accounts and the certificates of indebtedness described respectively in paragraphs 5 and 6 of the petition as amended and in paragraphs 7, 8, 9, and 10 of the petition as amended are each taxable property, owned on January 1, 1942, by the petitioner and as such subject to tax in Fulton County, Georgia.

12th

Because there is no equity in the bill as amended.

13th

Because the petition as amended sets forth no cause of action against the defendants or either of them and sets forth no facts entitling petitioner to any of the relief prayed.

Wherefore, defendants pray that this demurrer and the original demurrer be each sustained upon each and every ground thereof, and that plaintiff's petition be dismissed.

E. H. Sheats, W. S. Northcutt, Standish Thompson,
Attorneys for Defendants.

[File endorsement omitted.]

[fol. 55] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

SECOND AMENDMENT TO PETITION.—Filed April 20, 1943

Comes now E. Jack Smith, contractor, a partnership composed of E. Jack Smith, Jack Clark, W. Corry Smith and R. L. Rivers, and by leave of the court first had and obtained, amends the petition heretofore filed in said case as follows:

1

Petitioner amends paragraph 12 of the original petition by adding thereto the following to be known as paragraph 12-A:

12-A. Petitioner shows that in pursuance of the notice and threat aforesaid, the said Board of County Tax Assessors of Fulton County, Georgia, did on Saturday, November 21, 1942, actually assess said accounts receivable and certificates of indebtedness against petitioner; that petitioner did not learn of said assessment until the following Monday, November 23rd, 1942, on which day, at petitioner's instance, petitioner's attorney prepared a petition and proposed order thereon for the purpose of contesting the taxability of said items, as well as for the purpose of enjoining the assessment and collection of taxes thereon; that said petition was not completed until late in the afternoon of November 23, 1942, at which time it was learned that the judge had left the court house. Petitioner's said attorney therefore went to the court house early on the morning of November 24, 1942, for the purpose of obtaining an order on said petition from the judge, who, under the rules of court, was authorized to sign the same; [fol. 56] that when he arrived at the office of such judge he learned that the judge had not arrived; that pending the arrival of the judge, petitioner's attorney then went to the office of the board of county tax assessors of said Fulton County, and requested Mr. Comer Davis, a member of the board, not to have the assessment entered on the Digest until petitioner's attorney was able to present the petition and order aforesaid to the judge for his signature; that he was advised by the said Comer Davis that the original assessment already had been sent to the office of Mr. Guy Moore, the tax receiver of said County, who

torney immediately went to the tax receiver's office and requested that the tax receiver not enter the said assessment upon the digest until said attorney had had an opportunity to present the petition to the judge; that he was advised by the tax receiver that the particular assessment, along with many others already had been delivered to one of the clerks in his office charged with the duty of making the actual entries on the digest. Thereupon petitioner's said attorney, accompanied by the tax receiver, went to the office where said clerk made the entries aforesaid and found the clerk actually making entries on the digest; that an examination disclosed that the particular assessment against petitioner in this case would be reached in alphabetical order within one hour and that it would be impossible for the tax receiver or the said clerk to withhold the entering of said assessment on the digest. Upon learning this, petitioner's said attorney went back to the chambers of the judge and obtained an order temporarily restraining and enjoining the assessment and entering of the same upon the digest and after filing and having the same docketed, he immediately served copies thereof on all of the defendants, including the tax receiver while the tax receiver, through his clerk aforesaid, was actually in the process of making entries on the digest and only a few min-
[fol. 57] utes before the particular assessment involved in this case would have been so entered.

Morgan Belser, Attorney for Plaintiff.

Duly sworn to by R. L. Rivers. Jurat omitted in printing.

In Superior Court of Fulton County

Order Allowing Second Amendment to Petition—April 20, 1943

The within and foregoing petition is hereby allowed and ordered filed subject to objection and demurrer.

This April 20, 1943.

Walter C. Hendrix, Judge Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 58] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

RENEWAL OF DEMURRER—Filed May 11, 1943

Now come defendants and respectfully renew their demurrer filed in this case on Jan. 16, 1943, and on March 29, 1943, which demurrer is renewed to the petition as amended by amendments filed March 29, 1943, and April 20, 1943.

Said demurrer is renewed upon and each and every ground thereof to the plaintiff's petition as amended.

Wherefore defendants pray that their demurrers heretofore filed be sustained and that plaintiff's petition as amended be dismissed.

E. H. Sheats, W. S. Northcutt, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 59] IN SUPERIOR COURT OF FULTON COUNTY

E. JACK SMITH et al.

vs.

T. E. SUTTLES et al.

ORDER OVERRULING DEMURRERS—May 14, 1943

GEORGIA,

Fulton County:

In the above entitled cause the defendants filed a demurrer to the plaintiffs' petition. This demurrer was filed on the 15th day of January, 1943.

Thereafter, on the 29th day of March, 1943, the plaintiffs filed an amendment. On the same date the defendants filed a renewal of their original demurrer to the petition as thus amended and urged all of the general grounds of the said demurrer which had been theretofore filed to the petition as amended and urged grounds 1, 2, 3, 8 and 9 of their demurrer to the plaintiffs' petition as amended and asked that the plaintiffs' petition as amended be dismissed as set

forth in all of the general grounds of the demurrer heretofore filed. Said demurrer also urged additional grounds, namely, grounds 10, 11, 12 and 13 to the petition as amended.

Thereafter, on the 20th day of April, 1943, the plaintiffs filed an additional amendment and subsequently thereto the defendants filed a renewed demurrer to the petition as amended or as twice amended.

All of these demurrers coming on for a hearing and after hearing argument it is considered, ordered and adjudged by the court as follows: That all of the general demurrers be and the same are hereby overruled.

It is further considered, ordered and adjudged by the court that grounds 1, 2, and 3 of the demurrer filed by [fol. 60] the defendants on January 15, 1943, be and the same are hereby overruled.

It is further considered, ordered and adjudged by the court that in view of the amendments that grounds 4, 5, 6, and 7 of the demurrer filed January 15, 1943, be and same are hereby overruled.

It is further considered, ordered, and adjudged that grounds 8 and 9 of the demurrer filed on January 15, 1943, be and the same are hereby overruled.

It is further considered, ordered, and adjudged that the demurrer filed by the defendants on the 29th day of March, 1943, be and the same is hereby overruled on each and every ground thereof.

It is further considered, ordered, and adjudged by the court that the renewed demurrer to the plaintiffs' petition as amended (filed on May 11, 1943) be and the same is hereby overruled.

This 14th day of May, 1943.

Walter C. Hendrix, Judge, S. C. A. C.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] IN THE SUPREME COURT OF GEORGIA

DAVIS et al.

vs.

SMITH et al.

OPINION—November 11, 1943

By the COURT:

Non-interest-bearing certificates of indebtedness issued by the State Highway Board of Georgia under the provisions of the act approved February 26, 1941 (Georgia Laws 1941, p. 596), and accounts receivable (1) for paving, due by a county in this State, and (2) a like unpaid balance due by the United States Government for work done and labor and materials furnished in the erection of airports for the United Army, and held by the citizens of this State, are taxable as property, and are not exempt therefrom as falling within what is known as the instrumentalities rule.

A contractor partnership composed of E. Jack Smith, Jack Clark, and R. L. Rivers, residents of Fulton County, Georgia, and W. Corry Smith, a resident of Tennessee, filed a petition against Comer Davis, Reese Perry, and John C. Townley in their capacity as the board of county tax assessors of Fulton County, and against Guy Moore as tax receiver, and T. E. Suttles as tax collector of said county, and sought to enjoin the defendant tax officials from making any assessment against the plaintiff partnership by reason of its ownership of accounts receivable and of certificates of indebtedness described in the petition, for the calendar year 1942; and sought to enjoin the defendants from entering said assessments or from issuing executions based thereon, or from doing anything to force Smith, the contractor, to pay taxes on such accounts receivable and [fol. 63] certificates of indebtedness. In the petition it was alleged as follows: Petitioner is in the contracting and construction business, and furnished paving materials to and performed certain work in constructing public highways and United States air-bases for the State of Georgia, various counties of Georgia, and the United States Government. On January 1, 1942, petitioner held and owned the following accounts due to it by the County of Camden, $1102.14,

the State of Georgia, $15,086.84, and the United States Government, $29,831.10. It held and owned certificates of indebtedness amounting to $147,050, issued to it by the Highway Department of Georgia, in accordance with the act of the General Assembly approved February 26, 1941 (Georgia Laws 1941, p. 596). The indebtedness owing by Camden County represented an open account for furnishing and laying paving materials on a public highway in that county, commenced and completed within the year 1941, and performed under contract with Camden County. This contract was not in writing, but was orally entered into on or about July 10, 1941, between petitioner and the Board of Commissioners of Camden County, under the terms of which it was agreed that petitioner would construct a public highway in the county, furnishing specified labor and materials, and that Camden County would pay a stated sum therefor. Although said work was done and said materials furnished before January 1, 1942, payment to petitioner was not made until afterward. Accordingly this item of $1,102.14 represented an open account receivable due to petitioner on January 1, 1942. The indebtedness of the State represented an open account due for grading, draining, paving, furnishing paving materials, and constructing public highways in Liberty and Camden Counties, which work was commenced and completed within the year 1941, and was performed in accordance with the terms of a contract executed on October 8, 1941, between petitioner and the State Highway Board, a copy of said con- [fol. 64] tract being attached to the petition. The indebtedness of the United States Government represented an open account due for such work and materials used in constructing United States Army Airports at Savannah, which work was performed under contract with the U. S. Government, the amount of this indebtedness due on January 1, 1942, being $29,831.10, the unpaid balance owed to petitioner on January 1, 1942.

Petitioner alleged, that the certificates of indebtedness referred to evidenced an indebtedness in said amount due to petitioner by the State of Georgia for work done and performed under contract with the State; that the State Highway Department contracted for such materials by inviting bids from contractors engaged in furnishing such materials, and by awarding contracts to those making the lowest bid; that petitioner was the lowest bidder; that after

the delivery of said materials, the State Highway Department so long as funds were available for such purposes, paid to petitioner monthly for the materials furnished and delivered during the preceding month; that at the time the State Highway Department was indebted to petitioner for such materials in various sums aggregating the principal sum of $117,050.68, the said Highway Department being without funds sufficient to liquidate said indebtedness, thereupon issued to petitioner certificates of indebtedness aggregating said sum, which certificates were issued in accordance with the act of the General Assembly of Georgia, approved February 26, 1941 (Ga. L. 1941, p. 596). Petitioner alleged that said accounts receivable and said certificates of indebtedness are not subject to taxation in Fulton County or the State of Georgia; that the threatened taxation of them would deprive petitioner of his constitutional rights guaranteed to him by the State constitution, art. 1, sec. 1, par. 3 and by the fourteenth amendment to the U. S. Constitution; that it would seriously affect the salability of all of petitioner's property, and would greatly annoy petitioner, because said property is actually being used by [fol. 65] petitioner in constructing runways and other pavement on United States Army airports.

The defendants demurred to the petition, on the grounds: that no cause of action is set forth; that the petition shows no equity; that it fails to disclose any reason why the accounts receivable and certificates of indebtedness are not subject to tax in Fulton County; that the allegations relating to the unconstitutionality of the threatened assessment and taxation of petitioner's accounts are without merit, for the reason that petitioner shows no legal reason why such assessment and such taxation would deprive it of its property without due process of law; that the allegations seek only an alleged constitutional right by reference only to a clause of the constitution, without setting forth the reason of the basis of said attack, or any facts which disclose lack of due process in the conduct of the defendants; that it appears from the petition that each species of the described property owned by petitioner is property subject to ad valorem tax in Fulton County for the year 1942, and property which the constitution and laws of Georgia require to be taxed. The defendants demurred specially to those portions of the petition relating to accounts due petitioner by Camden County, the State of Georgia, and the

United States Government, and those relating to certificates of indebtedness issued to petitioner by the State Highway Department, and to all portions of the petition relating respectively to indebtedness owing to petitioner by Camden County and by the State of Georgia and by the United States Government, upon the grounds: (a) that said portions of the petition set forth no cause of action, and (b) it affirmatively appears that the respective accounts and the certificates of indebtedness are taxable property, owned on January 1, 1942, by petitioner, and as such subject to tax in Fulton County.

The demurrer was overruled, and the defendants excepted.

[fol. 66] Grice, Justice:

Taxation is the rule, and exemption the exception. Athens City Water Works Co. v. Athens, 74 Ga. 413; Pacific Co. v. Johnson, 285 U. S. 480, 491. What is here sought to be taxed are accounts receivable, due by the government of the United States in the one instance, and Camden County in the other, and a certificate of indebtedness issued by the State Highway Board of Georgia by virtue of the act approved February 26, 1941 (Ga. L. 1941, p. 596). Section 5A of that act provides in express terms that, "No acknowledgment, evidence of debt, or chose in action issued by virtue of this act shall bear any interest for the past or future." The indebtedness of the United States government represents an amount due by it for certain work and material used in constructing United States Army airports at Savannah, the account representing an unpaid balance. That due by Camden County represents an open account for services and paving material on a public highway in that county. The certificate of indebtedness issued by the State Highway Board represents money due to the defendant in error by the State highway authorities for work done and materials furnished in the building of roads. Defendant in error was a contractor doing work on several projects out of which these debits grow. It is and was not an officer of the government, the State or the county. Ordinarily bills receivable and accounts receivable are personal property and subject to be taxed. Code, §§ 92-102, 92-6215. None of the several species of property in question has been specifically ex-

empted by the constitution of this State nor the statutes passed in conformity therewith. If any of it be exempt, it must be because it falls within what is known as the instrumentalities rule. The first time that rule was mentioned in the decisions of this court was in Penick v. Foster, 129 Ga. 217 (58 S. E. 773, 12 L.R.A. (N.S.) 1159, 12 Ann. Cases 346), where it was ruled that neither the bonds [fol. 67] of the State nor of any of its political subdivisions were subject to be taxed; the precise question being whether bonds issued by a municipality and in the hands of a citizen and resident of this State were taxable by the State and the county. The decision in that case was based on the proposition, that, credit being indispensable to any government, it is necessary to establish the same in order to carry on successfully governmental functions, and that one of the most usual methods of using such credit is by the issue of securities and placing them in the markets of the world for sale. The further argument was that every such loan is made in the exercise of a governmental power and to effectuate a governmental object; and that when a negotiable instrument is issued in order to raise money to effectuate a governmental purpose, the paper issued by it is an instrumentality of government. We have nothing of the kind here. Other courts and textwriters, in dealing with the instrumentalities rule, call attention to the fact that if a tax were placed upon these instrumentalities issued by the government, and bearing interest, it would lessen their worth on the market, and to that extent place a burden upon and hamper the government in the exercise of its functions to borrow money, and cause the securities so issued by the government to bring less on the market. See authorities there cited, and others hereinafter mentioned.

None of those considerations are operative in the instant case. It was ruled in City of LaGrange v. Whitley, 180 Ga. 805, that a contractor was not exempt from an ordinance imposing an occupation tax because the business conducted by him was that of doing paving under contract with public bodies and that such status did not give him the position of an agency of government. In James v. Dravo Contracting Co., 302 U. S. 134, it was ruled: "An independent contractor, engaged under his contract with the Government in the construction of locks and dams for the improvement of navigation, is not an instrumentality

[fol. 68] of the Government." In Penn Dairies v. Milk Control Commission, — U. S. — (63 Sup. Ct. 617, L. ed.), it was said that "those who contract to furnish supplies or render services to the Government are not such agencies and do not perform governmental functions. * * * The trend of our decisions is not to extend governmental immunity from State taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the constitution presupposes the continued existence of the States functioning in co-ordination with the national government, with authority in the States to lay taxes and to regulate their internal affairs and policy; and that State regulation like State taxation inevitably imposes burdens on the national government of the same kind as those imposed on citizens of the United States within the State's borders." Citing Metcalf v. Mitchell, 269 U. S. 523, 524 (46 Sup. Ct. 174, 70 L. ed. 384).

The cases of Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522 (36 Sup. Ct. 453, 60 L. ed. 779), and Gillespie v. Oklahoma, 257 U. S. 501-506 (42 Sup. Ct. 171, 66 L. ed. 338), may be distinguished. In the first of these two it was held: "Oil leases of land in Oklahoma made by the Osage tribe of Indians under authority of the acts of February 28, 1891, and March 3, 1905, are under the protection of the Federal Government, and the lessee is a Federal instrumentality, and the State can not, therefore, tax its interest in the leases either directly, or as the leases are represented by the capital stock of the corporation owning them." In the Gillespie case: "The net income derived by a lessee from sales of his share of oil and gas received under leases of restricted Creek and Osage lands, which constitute him in effect an instrumentality used by the United States in fulfilling its duties to the Indians, can not be taxed by a State." The basis of these two decisions rests on the peculiar relationship that the Government of the United States bears to the Indian tribes, which have [fol. 69] frequently been referred to as the wards of the nation, they being directly under the protection of the Federal Government. Nothing in McCulloch v. Maryland, 4 Wheat. 316, Weston v. Charleston, 2 Pet. 449, Pittman v. Home Owners Loan Cor., 308 U. S. 21, Banks v. Mayor, 7 Wall. 16, or Federal Land Bank of New Orleans v. Cros-

land, 261 U. S. 374, is in conflict with the position of the plaintiffs in error that these credits are taxable. The case of People ex rel. Astoria Light &c. Co. v. Cantor, 236 N. Y. 417 (141 N. E. 901), has been examined; and we are unable to follow the reasoning therein, or the conclusion reached. It was held: "An unpaid balance of a debt owing on account from the United States on a fully performed war contract is not taxable under Greater New York Charter and Tax Law, § 12, as taxation by the State would hinder the exercise of the Federal Government's constitutional powers to borrow money on the credit of the United States, to declare war, and to raise and support armies." The reasoning of the New York court does not satisfy us. The only authorities cited in support of that ruling are McCulloch v. Maryland, and Banks v. Mayor, supra. Neither of them, in our opinion, supports the decision. It is true that between the New York case and the instant case is this difference, to wit: in that case the contractor was to receive an amount equivalent to the actual cost plus a reasonable amount for certain overhead charges. We can not perceive, however, that this makes any difference in principle. Let it not be thought that we are of the oipnion that a tax, not on the property of the sovereign, which adds to it only an incidental *burden* to the government, is for that reason illegal, nor would it be so even if it also carries a *hindrance* or *embarrassment* to the government which was only incidental. See Wheeler Lumber Co. v. United States, 251 U. S. 572; Liggett & Myers Co. v. United States, 299 U. S. 383; [fol. 70] Alward v. Johnson, 282 U. S. 509; and particularly Railroad Co. v. Peniston, 18 Wall. 5, where it was said: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-

coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited."

We apprehend that if the defendant in error had failed to pay his ad valorem taxes on the machinery it used in executing the contracts out of which these debts grew, a tax execution would have been issued and levied thereon. This might have tended incidentally to embarrass the government; for it probably would have withdrawn from use an implement in use by the contractor on a government project. Could it be successfully claimed that the State was impotent [fol. 71] to enforce its claim for taxes against the property merely because of the use to which its owner had put it? We think not, in view of the controlling authorities. Our conclusion is that the taxation of an account receivable, due from the government of the United States, would not so hinder and embarrass the government in carrying out the powers conferred by the constitution as to forbid the State and its political subdivisions from the exercise of the power to tax the same as property in the hands of the contractor. Nor is the same exempt for any other reason. In our opinion the same thing would apply to the two other credits here involved, one due by the State Highway Board, and the other by Camden County.

For a valuable annotation on the general principles involved in Penick v. Foster, supra, see 26 A. L. R. 547, continued in 44 A. L. R. 510.

Whether bills receivable and accounts receivable owed by the United States, the State, or a county have seldom or never before been taxed in Georgia, does not answer the question here involved. A like suggestion, however, seems to have been considered by this court in Georgia Railroad

& Banking Company v. Wright, 124 Ga. 596 (reversed on other grounds, 207 U. S. 127), where it was held that shares of stock in one corporation, owned by another, were taxable in the hands of the latter. It was said: "It cannot avail the railroad company that during all the years for which the tax now under consideration was levied it had issued annual statements showing its possession of the shares of stock now sought to be taxed, and that the comptroller-general might have ascertained from these statements, which were easily accessible to him, the Georgia Railroad's ownership of the shares. 'Estoppels against the State are not favored; and although they may arise from its express grants, they can not arise from the laches of its officers, since persons who deal with an officer of the government are bound to know the extent of his power and [fol. 72] authority.' Lott v. Brewer, 64 Ala. 287."

One other argument was suggested, rather than urged, and it was that it would not be in keeping with the honor and good faith of the State or any of its subdivisions to tax these debts. Courts can not decide cases according to their views as to what should be the public policy of the State. Judges are not made the keepers of the State's conscience. If it be the law that these items are taxable, we must so declare.

Judgment reversed. All the Justices concur, except

Jenkins, Presiding Justice, dissenting:

While in Penick v. Foster, 129 Ga. 217 (supra), the question was the power to tax municipal bonds, there designated as "instrumentalities of the government which creates the municipal corporation," the immunity declared seems not to have been based upon the fact that bonds were such an instrumentality, but rather upon the fact that such an instrumentality evidenced a government obligation, and that this immunity "is necessary in order that the functions of government be not unduly impeded." While the rule announced in the Penick case has by no means been universally adopted, it has been recognized in California, Louisiana, Michigan, Nebraska, South Carolina, South Dakota, and Tennessee. See especially Droll v. Furnas County, 108 Neb. 85 (187 N. W. 876, 26 A. L. R. 543), holding that warrants issued by a subdivision of the State are government instrumentalities, and as such are nontaxable

Stratis v. Anderson, 254 Mass. 536 (150 N. E. 842, 44 A. L. R. 510).

These rulings are not based upon any constitutional or statutory provision, but are grounded on the principle that the power to tax is the power to destroy, and that any levy of tax on a government obligation tends to impair the credit of the sovereign, and to impede the execution of its authorized functions. As I understand it, the word "instrumentality" has no special, narrow significance, the [fol. 73] fundamental basis of all of the above decisions being that the obligation is that of the sovereign government or of a subordinate branch thereof. The reasoning employed in the Penick case, that if bonds were permitted to be taxed, the governmental authority issuing them could not sell them nearly so advantageously, would apply with equal or greater force in the making of contracts, if holders are to be subjected to taxation on the sovereign's certificates of indebtedness.

The conclusion reached in this dissent is based, not only on the rule recognized by the court of last resort in the State of New York, in People ex rel. Astoria Light Co., 141 N. E. 901, dealt with but disapproved in the majority opinion, but as I see it is the necessary sequence of what was said by the Supreme Court of the United States, through its Chief Justice, in Banks v. Mayor, 74 U. S. (7 Wall.) 16, 21, 23, where the court, dealing with certificates of indebtedness, seems to have planted its holding squarely upon the fact that an authorized debt of the sovereign is not taxable; and that such certificates, even for indebtedness already incurred, stand upon precisely the same footing as bonds issued for the purpose of obtaining funds to be thereafter expended. In that decision the court used the following language: "Evidences of indebtedness of the United States * * * sometimes called stock or stocks, but recently better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under State legislation. * * * No one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States. * * * An attempt was made * * * to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince [illegible]

tinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satis- [fol. 74] faction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than of borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money. * * * The certificates of indebtedness * * * were received instead of money at a time when full money payment for supplies was impossible, and * * * are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued."

In Hibernia Savings Society v. San Francisco, 200 U. S. 310, 313, 314, the ruling just quoted was cited with approval, and the rule that certificates for past expenditures stand on the same footing as bonds seems to have been fully recognized, although the court held that mere warrants issued for "immediate" payment, being no more than checks or money, did not come within the rule.

The effect of the majority ruling would seem to be far-reaching. So far as I am aware, it will for the first time subject to taxation in this State a vast number of governmental obligations issued or owing by the various governmental agencies. It appears to me that if bonds issued by the State or one of its subordinate divisions, for the purpose of borrowing money, are non-taxable, *a fortiori* should an obligation, issued by any one of the authorized governmental agencies, where payment is in default, be non-taxable; since the impairment of credit or other impeding of governmental functions may be even greater than that resulting from the taxing of bonds. The results of the majority holding, both on the State or its subordinate divisions or governmental agencies, and affecting large groups [fol. 75] of persons to whom it may be necessary in times of financial stress to issue certificates, scrip, or other obligations in lieu of cash, may be so injurious as to seriously and literally impede the functions of government.

[fol. 76] IN SUPREME COURT OF GEORGIA

JUDGMENT—November 11, 1943

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

COMER DAVIS, Tax Assessor, et al.

v.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. All the Justices concur, except Jenkins, P. J., who dissents.

[fol. 77] IN SUPREME COURT OF GEORGIA

[Title omitted]

MOTION TO MODIFY JUDGMENT—Filed November 22, 1943

To the Honorable Supreme Court of Georgia:

This case came before the Supreme Court of Georgia by writ of error from the superior court of Fulton county; and the judgment of the trial court overruling the defendants' general demurrer to the petition was reversed by the Supreme Court on November 11, 1943.

Come now the defendants in error and respectfully pray that the Honorable Supreme Court modify the judgment and opinion rendered therein on November 11, 1943, by directing that the trial court, at the time the judgment of this court is made the judgment of the trial court, enter an order sustaining the defendants' general demurrer and dismissing the plaintiffs' petition, in order that the judgment of the Supreme Court may thus be made final within the Rules of the Supreme Court of the United States and the Federal Statutes requiring a final judgment as a prerequisite to jurisdiction to review the judgment of the Supreme Court of Georgia, it being the bona fide intention of

the defendants in error to carry this case to the Supreme Court of the United States within the time allowed by law.

Respectfully submitted, Morgan Belser, Attorney for the Defendants in Error.

I hereby certify that I have served a true copy of this motion on W. S. Northcutt, Esq., counsel for the plaintiffs in error, by mailing it to him with the proper postage affixed.

Morgan Belser, Attorney for Defendants in Error.

[File endorsement omitted.]

[fol. 78] SUPREME COURT OF GEORGIA

ORDER MODIFYING JUDGMENT—Dec. 2, 1943

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

On motion of counsel for the defendants in error it is ordered that the judgment rendered in this case on November 11, 1943, be hereby amended so that it shall now read as follows:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. It is further ordered and adjudged that the trial court, at the time the remittitur of this court is made the judgment of that court, shall enter an order sustaining the demurrer and dismissing the petition. All the Justices concur except Jenkins,

[fol. 79] SUPREME COURT OF GEORGIA

MODIFIED JUDGMENT—November 11, 1943

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

COMER DAVIS, tax assessor, et al.

vs.

E. JACK SMITH et al.

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the court erred in overruling the demurrer to the petition. It is further ordered and adjudged that the trial court, at the time the remittitur of this court is made the judgment of that court, shall enter an order sustaining the demurrer and dismissing the petition. All the Justices concur except Jenkins, P. J., who dissents.

[fol. 80] IN SUPREME COURT OF GEORGIA

[Title omitted]

ORDER STAYING TRANSMITTAL OF REMITTITUR—Filed Dec. 2, 1943

On motion of counsel for the defendants in error it is ordered that the transmittal of the remittitur of this court, as amended this day, be stayed for thirty (30) days.

R. C. Bell, Chief Justice, Supreme Court of Georgia.

This second day of December, 1943.

[File endorsement omitted.]

[fol. 81] IN THE SUPREME COURT OF GEORGIA

[Title omitted]

ORDER FURTHER STAYING TRANSMITTAL OF REMITTITUR—Dec. 30, 1943

On motion of counsel for the defendants in error, It Is Ordered that the transmittal of the remittitur of this Court be stayed until February 2, 1944.

This the 29 day of December, 1943.

R. C. Bell, Chief Justice, Supreme Court of Georgia.

[File endorsement omitted.]

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Georgia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. [redacted] 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners,

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of Fulton County, and GUY MOORE, as tax receiver, and T. E. SUTTLES, as tax collector of said county,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Georgia, and Brief in Support thereof.

BLAIR FOSTER,
Attorney for E. Jack Smith, Jack Clark, R. L. Rivers and W. Corry Smith, partners trading under the firm name of E. Jack Smith, Contractor,
Petitioners.

PHILIP H. ALSTON,
WM. HART SIBLEY,
MORGAN S. BELSER,
All of Atlanta,
Of Counsel.

TABLE OF CONTENTS

CASES AND STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO.

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners,

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of Fulton County, and GUY MOORE, as tax receiver, and T. E. SUTTLES, as tax collector of said county,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Georgia, and Brief in Support thereof.

Come now E. Jack Smith and the others named above as composing the partnership of E. Jack Smith, Contractor, and pray that a writ of certiorari issue to the Supreme Court of Georgia to review here the record and judgment entered by that court on the 11th day of November, 1943.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

Petitioners, as partners, were engaged in the contracting and construction business and as such had furnished paving materials and done work in constructing public highways for the State of Georgia and various counties of the State and in building United States Army airbases for the United States of America. For work so done, the State of Georgia, the County of Camden, and the United States Government owed petitioners on January 1, 1942, various sums. At that time the debt of the State was evidenced by a certificate of indebtedness amounting to $117,050.00, in addition to an open account of $15,086.84, while the obligations due by Camden County and the United States to petitioners took the form of open accounts. The former stood at $1,102.14, the latter at $29,831.10.

In the fall of 1942, the partners, now petitioners here, brought their equitable bill in the Superior Court of Fulton County against named county tax officials, respondents here, seeking thereby to enjoin them from assessing against petitioners, as property subject to State and County ad valorem taxation, the accounts and certificates owed to them on the first day of the year by the Federal Government, the State and the County. The bill challenged the right to make the assessment which was threatened upon the ground that such assessment was prohibited both by the due process clauses of the State and National Constitutions. Furthermore, petitioners' bill denied the right of the defendants to carry out their avowed

purpose of taxing these accounts and certificates because to do so would be to impose a state and county tax upon instrumentalities of the United States of America, the State of Georgia, and a governmental subdivision of the State, in contravention of constitutional limitations of the Federal and State Constitutions.

Against the petition as twice amended the defendants lodged a general demurrer through which the petition's dismissal was sought upon the ground that it appeared affirmatively from the allegations as made therein that "each species of property owned by petitioners", i.e., the accounts and the certificates, was taxable property, owned on January 1, 1942, by petitioners and as such was subject to tax in and by Fulton County and the State of Georgia. The trial court overruled the demurrer, but the Supreme Court of Georgia, to which the losing tax officials took the case by exceptions, reversed and, with one Justice dissenting, entered a judgment on November 11, 1943, directing that the general demurrer be sustained and the petition dismissed. The issue of constitutional immunity from local taxation of open accounts when owed by the Federal Government was squarely raised in the State Supreme Court and there as squarely decided (R. 62).

JURISDICTION

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., § 347), in that petitioners in their original action brought in the Superior Court of Fulton County, being the court of first instance,

specially set up and claimed in their equitable bill filed therein a title, right, privilege and immunity under the Constitution of the United States (R. 7), which Federal claim was expressly denied to them by the decision and judgment of the Supreme Court of Georgia entered on the 11th day of November, 1943 (R. 62, 79). This was a final judgment or decree rendered by the highest court of the State in which a decision could be had. (R. 79.)

QUESTIONS PRESENTED

1. Whether an open account owed by the United States of America for construction work done for it is such an instrumentality or means of the Federal government as to be immune from ad valorem taxes which the State may lay upon personal property (defined by statute to include money due on open accounts) otherwise taxable by it.

2. Whether the implied constitutional limitation on the power of the State to tax the functions, activities and instrumentalities of the National Government extends to and includes within the prohibition an account due and owing by the United States to a contractor for construction work done by him for it.

3. Whether an account due and owing by the United States Government to a contractor for work done and material furnished by him to it is such an instrumentality or means of the Federal government that it cannot be taxed by State or local government.

REASONS FOR GRANTING THE WRIT

This case presents important new questions with respect to tax immunity of governmental instrumentalities. The decision of the Supreme Court of Georgia should be reversed because:

1. The Supreme Court of Georgia has decided a Federal question of substance, namely, the taxability by a State of an obligation of the United States, in a way that is probably not in accord with applicable decisions of this Court, especially those of *McCulloch vs. Maryland*, 4 Wheat., 316; *Weston vs. Charleston*, 2 Pet. 449; and *Banks vs. Mayor*, 7 Wall. 16.

2. The Supreme Court of Georgia has decided a Federal question of substance, namely, the taxability by the State of an open account owed by the United States, which question has not heretofore been determined by this Court.

3. The Supreme Court of Georgia has decided, and we believe erroneously, a question of great public importance, interest and concern affecting relations between the Government of the United States and those who enter or would enter into contracts with it that will result in an indebtedness taking the form of an open account from the Government to the citizen. The necessary effect of the decision of the Georgia Supreme Court is seriously to impede the functions of the National Government and impair its credit, results which this Court under the law has never tolerated in other circumstances, and which now, when the Government should function at its highest and best, should be especially condemned.

SUPPORTING BRIEF

Personal property is liable to ad valorem taxation in Georgia.[1] Such property "includes * * credits and effects, whatsoever they may be; * * money due on open account or evidenced by notes, contracts, bonds or other obligations, secured or unsecured."[2] Consequently, respondents would have been acting with ample statutory support in assessing for taxes against petitioners the moneys due them from the United States upon open account were it not for the restraint imposed by the doctrine that State and local governments are not free to tax instrumentalities of the Federal government. The majority opinion in the court below, while recognizing the rule, holds that it is without application to an ad valorem tax laid upon an open account. In effect Georgia's Supreme Court decides that an account owing by the United States for material and labor furnished to it under contract is not an instrumentality or means of the National Government within the meaning of the taxing prohibition that was stated in, and has stood since, the decision in *McCulloch*

---

[1] Code 1933 § 92-101 reads:

"*Taxable property.*—All real and personal property, whether owned by individuals or corporations, resident or nonresident, shall be liable to taxation except as otherwise provided by law."

[2] Code 1933 § 92-102 provides:

"*What included in personal property.*—For the purposes of taxation personal property shall be construed to include goods, chattels, moneys, credits and effects whatsoever they may be; ships, boats, and vessels, whether at home or abroad, and capital invested therein; bonds and other securities of corporations of this or of other States; stock of corporations of other States; bonds, notes or other obligations of other States, and of the counties, municipalities or other subdivisions thereof; moneys due on open account or evidenced by notes, contracts, bonds, or other obligations, secured or unsecured;

vs. Maryland.[1] Petitioners by this certiorari question that view and seek here a judgment which would follow the law announced in the dissenting opinion in the State court.

The essence of the question that is now presented to this Court is whether the facts of the instant case are to be ruled by such cases as *McCulloch vs. Maryland*, supra, *The Banks vs. The Mayor*,[2] *Weston vs. Charleston*,[3] and *Indian Motocycle Co. vs. U. S.*,[4] or by such decisions as *James vs. Dravo Contracting Company*[5], *Alabama vs. King & Boozer*[6] and *Penn Dairies vs. Milk Control Commission*.[7] We think that it is the doctrine of the former and not of the latter cases that should govern.

At the base of the decisions in the *Dravo, King & Boozer*, and *Penn Dairies* cases is the holding that the contractor who does work for the Federal Government is not on that account an agent or instrumentality of the Government. Thus in the *Dravo* case a non-discriminating State tax laid upon the gross receipts of an independent contractor received under his contract with the United States was sustained over the contention that the contractor was himself an instrument of government and that the tax was laid upon the contract itself. In the case of *King & Boozer* a sales tax of Alabama was upheld when applied to purchases of materials made by a contractor when bought for use, and used, in the performance of a

---

[1] 4 Wheat. 316
[2] 7 Wall. 16
[3] 2 Pet. 449
[4] 282 U. S. 570
[5] 302 U. S. 134
[6] 314 U. S. 1
[7] 318 U. S. 261

cost plus building contract for the government. The basic holding was that such a contractor was not the agent of the government in making the purchases and in consequence the tax was not laid upon the government as the buyer. The Court in the *Penn Dairies* case repeated its earlier holding that those who furnish supplies and render services under contract to the government are not Federal agencies, are not immune from non-discriminatory State taxes, and are subject to State regulation, including price fixing.

Tax immunity in the present case is not grounded upon the consideration that the contractor, whose debt from the government was in the form of an account receivable, was because of that circumstance an agent of the United States. Nor is tax exemption sought because the account represents work done for and material furnished to the government. Petitioners here ask this Court to view the tax which the Georgia Supreme Court has validated as one to be imposed directly upon an instrumentality, means and an operation whereby the United States exercises its governmental powers. So seen, the tax must fall on the authority of cases reaching from *McCulloch vs. Maryland*, supra, to *Mayo vs. United States*, 319 U. S. 441, where the holding has been that the supremacy clause of the Federal Constitution proscribes any state tax which impedes the functions of the National Government.

This Court said in *Indian Motorcycle Co. vs. U. S.*, supra, at page 575:

> It is an established principle of our constitutional system of dual government that the instrumentali

ties, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

The doctrine of tax immunity does not depend upon the degree of the molestation but rests upon "the entire absence of power on the part of the State to touch, in that way at least, the instrumentalities of the United States." *Johnson vs. Maryland*, 254 U. S. 51.

The question, then, narrows itself to a determination of whether the obligation of the United States to a contractor represented by an open account made up of items for material and labor furnished under a contract (R. 37) for the construction of an air base is an instrumentality and means of the government used in carrying on its civil and military operations. If it is, then the State of Georgia and its subdivision, the County of Fulton, are powerless to subject it to taxation. If it is not, the proposal of local state and county officials to tax it must be, as it was, upheld.

In the first place, it may be noticed that the contract (R. 37) between petitioners and the War Department of

the United States of America from which the obligation arises is one forming a part of the vast program upon which the nation has embarked in its effort to carry the war to victory. The governmental powers involved, therefore, include the war making power of the Congress in addition to those others vested by the Constitution in the Government of the United States. *Constitution*, Art. I, § 8. This Court may well take judicial cognizance of the fact that in providing the many, expensive and diverse facilities requisite to the training and equipping of the country's armed forces, the departments and agencies of the government have relied heavily, if not entirely, upon the national credit. A common form in which this credit appears is of money due by the United States to contractors under construction contracts. In other words, the government's operations in the vast fields of training, equipping, feeding, housing and transporting our armed forces are dependent in no small way upon government credit which has taken the form of debts due under contract, i.e., open accounts with various contractors.

But apart from the extensive use of open account credit by the government in the furtherance of the war effort, it must be plain that this type of credit is utilized constantly by the United States and its agencies. It is a means universally employed to obtain credit, and in many instances it is as effectual as written evidence of the obligation, such as notes, debentures or certificates of indebtedness.

A debt owed by the government, then, whatever shape it may take, is an obligation of the government, and a tax upon it is a tax upon the credit of the government. In

pointing out the distinction between a State tax upon federal checks and warrants and one upon governmental obligations, this Court said in *Hibernia Savings Society vs. San Francisco*, 200 U. S. 310, 313:

> "The basis of this exemption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the Government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the Government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the value of the obligations issued by the Government for that purpose impairs *pro tanto* their market value."

McCulloch vs. Maryland established the doctrine that obligations of the United States issued by it as a means of providing revenue, or for the payment of its debts, were beyond the reach of taxation by the States. The Chief Justice repeated the doctrine in *Weston vs. City Council of Charleston*, supra, and the Court there, invalidating local taxes on what was then called "stock" of the United States, owned by an individual, held such a tax to be one laid upon the power to borrow money on the credit of the United States and hence unconstitutional. Speaking for the Court, Chief Justice Marshall said (at p. 468):

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent,

however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

It remained for the court to apply this rule to obligations of the government incurred, not for money borrowed upon government credit, but for supplies and materials furnished to it and for which it had issued its certificates of indebtedness. This application was made in *The Banks vs. The Mayor*, supra, where it was said:

> "Evidences of indebtedness of the United States * * sometimes called stock or stocks, but recently better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under State legislation * * * No one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States. * * An attempt was made * * to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly to creditors in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money. * * The certificates of indebtedness

> * * were received instead of money at a time when full money payment for supplies was impossible, and * * are as much beyond the taxing power of the States as the operations themselves in furtherance of which they were issued."

We say, with the dissenting Justice of the State court, that the Federal "instrumentality" which the State may not tax is not a word having a special, narrow significance. It denotes the means by which the governmental activity is conducted. It embraces notes as an instrumentality for borrowing money and obtaining credit; certificates of indebtedness as a means of obtaining supplies and materials upon credit. It must, so it seems to us, include an open account when used as a medium by which the government gets work done and material furnished. Both the certificate of indebtedness and the open account are means used for the same end, and that end is credit. If the tax locally laid upon the certificate is invalid for the reasons stated in *The Banks vs. The Mayor*, the tax sought to be imposed in the instant case is also invalid, and for the same reasons.

So far as we have been able to find, a single court only has passed upon the precise point which the present petition raises. In *People ex rel. Astoria Light, Heat & P. Co. vs. Canton*, 113 N. E., 901, the New York Court of Appeals was asked to hold that an amount due from the United States for the manufacturing and furnishing of gas masks during the last war was simply an indebtedness due from a solvent debtor and was ordinary personal property, assessable and taxable by the State. That Court would not accept such a view and, upon the authority of

the cases which we have just discussed and upon the principles laid down in them, the indebtedness was said to be exempt from taxation. The dissent in the court below characterized this New York case "as the necessary sequence" of what this Court said in *The Banks vs. The Mayor*. And so it seems to us.

When the defendants in the court of first instance sought to assess for taxation the amount due petitioners from the government, they, in reality, purposed taxing an obligation of the United States, and this was the equivalent of a proposal to tax the credit of the government. Unless this Court intervenes, the challenged decision of the Georgia Supreme Court validating and approving this purpose will set at naught, within this State at least, the doctrine that "instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States" — a doctrine first announced more than a century and a quarter ago and never to this day departed from.

CONCLUSION

The petition for certiorari should be granted in order that this Court may review the decision of the Supreme Court of Georgia heretofore rendered in this case.

Respectfully submitted,

BLAIR FOSTER,

Attorney for E. Jack Smith, Jack Clark, R. L. Rivers and W. Corry Smith; partners trading under the firm name of E. Jack Smith, Contractor,

Petitioners.

PHILIP H. ALSTON,

WM. HART SIBLEY,

MORGAN S. BELSER,

All of Atlanta,

Of Counsel.

FILED OCT 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS, and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners,

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of Fulton County, et al.,

Respondents.

BRIEF ON BEHALF OF PETITIONERS

BEN H. SULLIVAN,
484 Union Trust Building,
15th and H Streets,
Washington, D. C.
Attorney for E. Jack Smith, Jack Clark, R. L. Rivers and W. Corry Smith, partners trading under the firm name of E. Jack Smith, Contractor,
Petitioners.

MORGAN S. BELSER,
Atlanta, Georgia,
Of Counsel.

SUBJECT INDEX

TABLE OF CASES AND CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NO. 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS, and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners,

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of Fulton County, et al.,

Respondents.

BRIEF ON BEHALF OF PETITIONERS

Reference to Report of Opinions In Courts Below

The opinion of the Supreme Court of Georgia is printed in 28 S.E. 2nd. 148 (Advance Sheet No. 2, January 20, 1944).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A. §344), in that petitioners in their original action brought in the Superior

Court of Fulton County, being the court of first instance, specially set up and claimed in their equitable bill filed therein a title, right, privilege and immunity under the Constitution of the United States (R. 5), which Federal claim was expressly denied to them by the decision and judgment of the Supreme Court of Georgia entered on the 11th day of November, 1943 (R. 55, 68). This was a final judgment or decree rendered by the highest court of the State in which a decision could be had. (R. 68.) This Court granted the writ of certiorari on April 3, 1944.

STATEMENT OF THE CASE

Petitioners, as partners, were engaged in the contracting and construction business and as such had furnished paving materials and done work in constructing public highways for the State of Georgia and various counties of the State and in building United States Army air bases for the United States of America. For work so done, the State of Georgia, the County of Camden, and the United States Government owed petitioners on January 1, 1942, various sums. At that time the debt of the State was evidenced by a certificate of indebtedness amounting to $117,050.00, in addition to an open account of $15,086.84, while the obligations due by Camden County and the United States to petitioners took the form of open accounts. The former stood at $1,102.14, the latter at $29,831.10.

In the fall of 1942, the partners, now petitioners here, brought their equitable bill in the Superior Court of Fulton County against named county tax officials, respondents here, seeking thereby to enjoin them from assessing

against petitioners, as property subject to State and County ad valorem taxation, the accounts and certificates owned to them on the first day of the year by the Federal Government, the State and the County. The bill challenged the right to make the assessment which was threatened upon the ground that such assessment was prohibited both by the due process clauses of the State and National Constitutions. Furthermore, petitioners' bill denied the right of the defendants to carry out their avowed purpose of taxing these accounts and certificates because to do so would be to impose a state and county tax upon instrumentalities of the United States of America, the State of Georgia, and a governmental subdivision of the State, in contravention of constitutional limitations of the Federal and State Constitutions.

Against the petition as twice amended the defendants lodged a general demurrer through which the petition's dismissal was sought upon the ground that it appeared affirmatively from the allegations as made therein that "each species of property owned by petitioners," i. e., the accounts and the certificates, was taxable property, owned on January 1, 1942, by petitioners and as such was subject to tax in and by Fulton County and the State of Georgia. The trial court overruled the demurrer, but the Supreme Court of Georgia, to which the losing tax officials took the case by exceptions, reversed and, with one Justice dissenting, entered a judgment on November 11, 1943, directing that the general demurrer be sustained and the petition dismissed. The issue of constitutional immunity from local taxation of open accounts when owed by the Federal Government was squarely

raised in the State Supreme Court and there as squarely decided (R. 55).

QUESTIONS PRESENTED

1. Whether an open account owed by the United States of America for construction work done for it is such an instrumentality or means of the Federal government as to be immune from ad valorem taxes which the State may lay upon personal property (defined by statute to include money due on open accounts) otherwise taxable by it.

2. Whether the implied constitutional limitation on the power of the State to tax the functions, activities and instrumentalities of the National Government extends to and includes within the prohibition an account due and owing by the United States to a contractor for construction work done by him for it.

3. Whether an account due and owing by the United States Government to a contractor for work done and material furnished by him to it is such an instrumentality or means of the Federal government that it cannot be taxed by State or local government.

STATUTES INVOLVED

Georgia Code 1933, Section 92-101 provides: "All real and personal property, whether owned by individuals or corporations, resident or nonresident, shall be liable to taxation, except as otherwise provided by law."

Georgia Code 1933, Section 92-102 provides: "For the purposes of taxation, 'personal property' shall be construed to include goods, chattels, moneys, credits and

effects, whatsoever they may be; ships, boats, and vessels, whether at home or abroad, and capital invested therein; bonds and other securities of corporations of this or of other States; stock of corporations of other States; bonds, notes or other obligations of other States, and of the counties, municipalities or other subdivisions thereof; money due on open account or evidenced by notes, contracts, bonds, or other obligations, secured or unsecured."

SPECIFICATION OF ERROR

The Supreme Court of Georgia erred:

1. In reversing the judgment of the trial court.

2. In holding that an account receivable due from the United States to a contractor is taxable as property in the hands of the contractor.

3. In applying the reasoning of the court and the conclusions reached in the cases of *James v. Dravo Contracting Company*, 302 U. S., 134, and *Penn Dairies v. Milk Control Commissioner*, 318 U. S., 261, to a case which involved a tax sought to be imposed upon an instrumentality, means and operation whereby the United States exercises its governmental powers rather than upon a contractor as an agent or instrument of the government.

4. In failing to hold that an open account owing by the United States is an instrumentality or means of the National Government within the meaning of the taxing prohibition announced in *McCulloch v. Maryland*, 4 Wheat., 316; *Weston v. Charleston*, 2 Pet., 449; and *The Banks v. The Mayor*, 7 Wall., 16.

As will be noted in the Georgia statutes previously quoted, personal property is liable to ad valorem taxation in Georgia. Such property "includes * * credits and effects, whatsoever they may be; * * money due on open account or evidenced by notes, contracts, bonds or other obligations, secured or unsecured." Consequently, respondents would have been acting with ample statutory support in assessing for taxes against petitioners the moneys due them from the United States upon open account were it not for the restraint imposed by the doctrine that State and local governments are not free to tax instrumentalities of the Federal government. The majority opinion in the court below, while recognizing the rule, holds that it is without application to an ad valorem tax laid upon an open account. In effect Georgia's Supreme Court decides that an account owing to the United States for material and labor furnished to it under contract is not an instrumentality or means of the National Government within the meaning of the taxing prohibition that was stated in, and has stood since, the decision in *McCulloch v. Maryland*, supra. Petitioners here question that view and seek here a judgment which would follow the law announced in the dissenting opinion in the State court.

DIVERGENT VIEWS

The essence of the question that is now presented to this Court is whether the facts of the instant case are to be ruled by such cases as *McCulloch v. Maryland*, supra, *The Banks v. The Mayor*, supra, *Weston v. Charleston*,

supra, and *Indian Motorcycle Co. v. U. S.*, 283 U. S., 570, or by such decisions as *James v. Dravo Contracting Company*, supra, *Alabama v. King & Boozer*, 314 U. S., 1, and *Penn Dairies v. Milk Control Commission*, supra. We think that it is the doctrine of the former and not of the latter cases that should govern.

CONTRACTOR AS AGENT OR INSTRUMENTALITY OF GOVERNMENT NOT HERE INVOLVED

At the base of the decisions in the *Dravo, King & Boozer*, and *Penn Dairies* cases is the holding that the contractor who does work for the Federal Government is not on that account an agent or instrumentality of the Government. Thus in the *Dravo* case a non-discriminating State tax laid upon the gross receipts of an independent contractor received under his contract with the United States was sustained over the contention that the contractor was himself an instrument of government and that the tax was laid upon the contract itself. In the case of *King & Boozer*, a sales tax of Alabama was upheld when applied to purchases of materials made by a contractor when bought for use, and used, in the performance of a "cost plus" building contract for the government. The basic holding was that such a contractor was not the agent of the government in making the purchases and in consequence the tax was not laid upon the government as the buyer. The Court in the *Penn Dairies* case repeated its earlier holding that those who furnish supplies and render services under contract to the government are not Federal agencies, are not immune from non-discriminatory State taxes, and are subject to State regulation, including price fixing.

Distinguishing the rulings made in those cases, of which *James v. Dravo Contracting Company*, supra, is typical, this Court in *United States of America v. County of Allegheny*, 88 L. ed. 845 (U. S. Supreme Court Law. ed. Advance Opinions No. 14) said:

> "But in all of these cases what we have denied is immunity for the contractor's own property, profits, or purchases. We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country."

Tax immunity in the present case is not grounded upon the consideration that the contractor, whose debt from the government was in the form of an account receivable, was because of that circumstance an agent of the United States. Nor is tax exemption sought because the account represents work done for and material furnished to the government. Petitioners here ask this Court to view the tax which the Georgia Supreme Court has validated as one to be imposed directly upon an instrumentality, means and an operation whereby the United States exercises its governmental powers. So seen, the tax must fall, on the authority of cases reaching from *McCulloch v. Maryland*, supra, to *United States v. County of Allegheny*, supra, where the holding has been that the supremacy clause of the Federal Constitution proscribes any state tax which impedes the functions of the National Government.

PRINCIPLE OF TAX IMMUNITY ABSOLUTE

The doctrine of tax immunity does not depend upon the degree of interference but rests upon the entire absence of power on the part of the state to tax instrumentalities of the United States.

This Court said in *Johnson v. Maryland*, 254 U. S. 51 at page 55:

> "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat., 316, 4 L. ed. 579, and that is the law today. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way at least, the instrumentalities of the United States."

In the same connection, this Court said, in *Indian Motorcycle Co. v. U. S.*, supra, at page 575:

> "It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

THE OBLIGATION OF THE UNITED STATES RESTING IN OPEN ACCOUNT IS AN INSTRUMENTALITY OF THE GOVERNMENT.

The question, then, narrows itself to a determination of whether the obligation of the United States to a contractor represented by an open account made up of items for material and labor furnished under a contract (R. 32) for the construction of an air base is an instrumentality and means of the government used in carrying on its civil and military operations. If it is, then the State of Georgia and its subdivision, the County of Fulton, are powerless to subject it to taxation. If it is not, the proposal of local state and county officials to tax it must be, as it was, upheld.

In the first place, it may be noticed that the contract (R. 32) between petitioners and the War Department of the United States of America from which the obligation arises is one forming a part of the vast program upon which the nation has embarked in its effort to carry the war to victory. The governmental powers involved, therefore, include the war making power of the Congress in addition to those others vested by the Constitution in the Government of the United States (Constitution, Art. I, §8). This Court may well take judicial cognizance of the fact that in providing the many, expensive and diverse facilities requisite to the training, and equipping of the country's armed forces, the departments and agencies of the government have relied heavily, if not entirely, upon the national credit. A common form in which this credit appears is of money due by the United States to contractors under construction contracts. In

other words, the government's operations in the vast fields of training, equipping, feeding, housing and transporting our armed forces are dependent in no small way upon government credit which has taken the form of debts due under contract, i.e., open accounts with various contractors.

But apart from the extensive use of open account credit by the government in the furtherance of the war effort, it must be plain that this type of credit is utilized constantly by the United States, and its agencies. It is a means universally employed to obtain credit, and in many instances it is as effectual as written evidence of the obligation, such as notes, debentures or certificates of indebtedness.

A debt owed by the government, then, whatever form it may take, is an obligation of the government, and a tax upon it is a tax upon the credit of the government. In pointing out the distinction between a State tax upon federal checks and warrants and one upon governmental obligations, this Court said in *Hibernia Savings Society v. San Francisco*, 200 U. S. 310, 313:

> "The basis of this exemption is the fact that a tax upon the obligations of the United States is virtually a tax upon the credit of the Government, and upon its power to raise money for the purpose of carrying on its civil and military operations. The efficiency of the Government service cannot be impaired by a taxation of the agencies which it employs for such service, and, as one of the most valuable and best known of these agencies is the borrowing of money, a tax which diminishes in the slightest degree the

value of the obligations issued by the Government for that purpose impairs pro tanto their market value."

McCulloch v. Maryland established the doctrine that obligations of the United States issued by it as a means of providing revenue, or for the payment of its debts, were beyond the reach of taxation by the States. The Chief Justice repeated the doctrine in *Weston v. City Council of Charleston*, supra, and the Court there, invalidating local taxes on what was then called "stock" of the United States, owned by an individual, held such a tax to be one laid upon the power to borrow money on the credit of the United States, and hence unconstitutional. Speaking for the Court, Chief Justice Marshall said (at p. 468):

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operation of government. It may be carried to an extent which shall arrest them entirely."

It remained for the Court to apply this rule to obligations of the government incurred, not for money borrowed upon government credit, but for supplies and materials furnished to it and for which it had issued its certificates of indebtedness. This application was made in *The Banks v. The Mayor*, supra, where it was said:

"Evidences of indebtedness of the United States * * sometimes called stock or stocks, but recently

better known as bonds or obligations, have uniformly been held by this court not to be liable to taxation under State legislation * * . No one affirms that the power of the government to borrow, or the action of the government in borrowing, is subject to taxation by the States. * * An attempt was made * * to establish a distinction between the bonds of the government expressed for loans of money and the certificates of indebtedness for which the exemption was claimed. The argument was ingenious, but failed to convince us that such a distinction can be maintained. It may be admitted that these certificates were issued in payment of supplies and in satisfaction of demands of public creditors. But we fail to perceive either that there is a solid distinction between certificates of indebtedness issued for money borrowed and given to creditors, and certificates of indebtedness issued directly in payment of their demands; or that such certificates, issued as a means of executing constitutional powers of the government other than borrowing money, are not as much beyond control and limitation by the States through taxation, as bonds or other obligations issued for loans of money. * * The certificates of indebtedness * * were received instead of money at a time when full money payment for supplies was impossible, and * * are as much beyond the taxing power of the States, as the operations themselves in furtherance of which they were issued."

So far as we have been able to find, a single court, only, has passed upon the precise point which the present petition raises. In *People ex rel. Astoria Light, Heat & Power Co. v. Cantor*, 143 N. E. 901, the New York Court of Appeals was asked to hold that an amount due from the United States for the manufacturing and furnishing of

gas masks during the last war was simply an indebtedness due from a solvent debtor and was ordinary personal property, assessable and taxable by the State. That Court, in refusing to accept such a view and, upon the authority of the cases which we have just discussed and upon the principles laid down in them, said:

> "We do not agree with this view. We think that the power of a state to tax the amounts becoming due under a contract with the Federal Government like the one in question would hinder and embarrass the government in carrying out the powers conferred by the constitutional provisions above quoted. If we should assume that a state, carried away by some species of popular passion or some fatuous theory of federal and state relations, should enact a law providing that the amount coming due to one of its citizens from the federal government under such a contract as this should be taxed at 50 per cent. of its amount, we think no one could doubt that the federal government would be hindered and embarrassed by such action in making contracts to enable it to carry on war. It either would not be able to get persons to take such contracts, or it would be compelled to add to the amount of compensation to be paid to them the extra amount which the state proposed to take by way of taxation. Either result would be a handicap and a source of hinderance; and in our judgment would clearly come within the abiding principles laid down in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, and *The Banks v. New York*, 7 Wall. 16, 19; L. ed. 57. The fact that the tax might be 2 per cent. instead of 50 per cent. would alter the amount of embarrassment but not the principle involved."

The dissent in the court below characterized this New

York case "as the necessary sequence" of what this Court said in *The Banks v. The Mayor*. And so it seems to us.

CONCLUSION

We say, with the dissenting Justice of the State Court, that the Federal "instrumentality" which the State may not tax is not a word having a special, narrow significance. It denotes the means by which the governmental activity is conducted. It embraces notes as an instrumentality for borrowing money and obtaining credit; certificates of indebtedness as a means of obtaining supplies and materials upon credit. It must, so it seems to us, include an open account when used as a medium by which the government gets work done and material furnished. Both the certificate of indebtedness and the open account are means used for the same end, and that end is credit. If the tax locally laid upon the certificate is invalid for the reasons stated in *The Banks v. The Mayor*, the tax sought to be imposed upon the open account in the instant case is also invalid, and for the same reasons.

Respectfully submitted,

BEN H. SULLIVAN,
121 Union Trust Building,
15th and H Streets,
Washington, D. C.
Attorney for E. Jack Smith, Jack Clark, R. L. Rivers and W. Corry Smith, partners trading under the firm name of E. Jack Smith, Contractor,
Petitioners.

MORGAN S. BELSER,
Atlanta, Georgia,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 23.

E. JACK SMITH, JACK CLARK, R. S. RIVERS, and W. COBBY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR, *Petitioners*,

v.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of FULTON COUNTY, et al., *Respondents*.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS.

BEN H. SULLIVAN,
424 Union Trust Building,
Washington, D. C.,
JOHN H. CONNAUGHTON,
316 Metropolitan Bank Building,
Washington, D. C.
Attorneys for Petitioners.

MORGAN S. BELSER,
Atlanta, Georgia,
Of Counsel.

INDEX.

TABLE OF CASES.

STATUTES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 23.

E. JACK SMITH, JACK CLARK, R. S. RIVERS, and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR; *Petitioners*,

v.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of county tax assessors of FULTON COUNTY, et al., *Respondents.*

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS.

STATEMENT.

In accordance with the order of the Court entered October 16, 1944, in this case, the petitioner herein submits this supplemental brief upon the two questions mentioned in said order.

First, is 31 U. S. C., sec. 742, applicable to the obligation here involved?

Second, if so applicable whether there is constitutional authority for the enactment.

These questions will be covered in the argument in the order in which we have stated them here.

The sole question remaining to be considered in this proceeding is whether or not the taxing authorities of the State of Georgia and the County of Fulton have authority to tax the balance due to the petitioner from the United States Government upon a contract covering the construction of an air base at Savannah, Georgia.

The petitioner in its original brief challenged the right of these authorities to tax this item because of the implied constitutional immunity from taxation which has prevailed since the decision in the case of *McCulloch* v. *Maryland*, 4 Wheaton, page 316. The petitioner now relies upon this line of authority as well as the exemption granted to obligations of this character under 31 U. S. C., sec. 742. This brief will be directed to the latter question as covered by the order of the Court.

ARGUMENT.

I.

Is 31 U. S. C., Sec. 742, Applicable to the Obligation Here Involved?

A determination of whether or not 31 U. S. C., sec. 742, is applicable to the obligation involved in this case would be promoted by a careful study of the history of the legislation. The first enactment of a statute of this character, which in the beginning was very simple in its language, grew out of the legislation in Congress providing for the raising of revenue to support the Union in the war between the States.

By an Act approved February 25, 1862, Chap. 33, para. 2, 12 Stat. 346, the Congress declared:

> "All stocks, bonds, and other securities of the United States held by individuals, corporations, or associa-

tions within the United States shall be exempt from taxation by or under state authority."

This statute above referred to was enacted in connection with the authorization for the issuance of Five Hundred Million Dollars in bonds to carry on the war between the States, and as a part of this Act the above language was incorporated exempting the bonds from taxation.

Later in the Act of March 3, 1863, Chap. 73, para. 1, 12 Stat. 710, the first statute was re-enacted in connection with an authorization to issue United States bonds in the amount of Three Hundred Million Dollars for that current fiscal year and Six Hundred Million Dollars for the following fiscal year, and attached thereto was a provision reading as follows:

"And all the bonds and treasury notes or United States notes issued under the provisions of this Act shall be exempt from taxation by or under state or municipal authority."

This subject again claimed the attention of Congress in the Act of March 3, 1864, Chap. 17, para. 1, 13 Stat. 13, in an Act supplementary to the Act of March 3, 1863. This Act authorized the Secretary of the Treasury in lieu of Two Hundred Million Dollars of the authorization in said Act of March 3, 1863, and in connection therewith, from time to time to borrow on the credit of the United States that amount of money and issue bonds therefor. This Act further provided:

"And all bonds issued under this Act shall be exempt from taxation by or under state or municipal authority."

Congress again legislated along the same line in the Act of June 30, 1864, Chap. 172, para. 1, 13 Stat. 218, authorizing the issuance of Four Hundred Million Dollars of government bonds and in connection therewith the Secretary was authorized to:

> "Dispose of such bonds * * * at any time, on such terms as he may deem most advisable, for lawful money of the United States, or at his discretion for treasury notes, certificates of indebtedness, or certificates of deposit issued under any Act of Congress."
>
> "And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

Congress further touched upon this subject of exemption from taxation of government obligations in the enactment of the Act of January 28, 1865, Chap. 22, para. 1, 13 Stat. 425, which provides that in lieu of any bonds authorized by the preceding Act that may remain unsold at the date of this Act; the Secretary of the Treasury may issue, under the authority of said Act, treasury notes of the description and character authorized by the second section of said Act. Provided that the whole amount of bonds and treasury notes shall not exceed the sum of Four Hundred Million Dollars and such treasury notes may be disposed of for lawful money, or for any other treasury notes or certificates of indebtedness, or certificates of deposit issued under any previous Act of Congress. And then provided an exemption from taxation in the following language:

> "and such notes shall be exempt from taxation by or under state or municipal authority."

The next enactment upon this subject was the Act of March 3, 1865, Chap. 77, para. 2, 13 Stat. 469, which authorized the issuance of Six Hundred Million Dollars of bonds and provided that the Secretary of the Treasury may, at his discretion, issue bonds or treasury notes authorized by this Act, in payment for any requisitions for materials or supplies which shall have been made by the appropriate department or offices upon the Treasury of the United States, on receiving notice in writing through the department or office making the requisition, that the owner of the claim for which the requisition is issued desires to subscribe for an

amount of loan that will cover said requisition, or any part thereof; and then provides an exemption from taxation in the following language:

> "and all bonds or other obligations issued under this Act shall be exempt from taxation by or under state or municipal authority."

Following the termination of the war between the States Congress passed the refunding Act of July 14, 1870, Chap. 256, para. 1, 16 Stat. 272, authorizing the Secretary of the Treasury to issue Two Hundred Million Dollars of bonds redeemable in ten years; Three Hundred Million Dollars of bonds redeemable after fifteen years; and One Thousand Million Dollars of bonds redeemable after thirty years, and then provided the exemption from taxation in the following language:

> "all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority."

This is a brief history of the legislation upon the subject of exemption from tax by state authorities of bonds, securities and other obligations of the United States. This legislation grew out of the financial necessity of the war between the States. It was probably enacted in the first great period of financial strain to the government of the United States.

A study of these various enactments discloses that the exemption clauses attached thereto were special in their nature with two exceptions. That is to say that the exemption clause in these Acts applied only to the issue of securities authorized by the Act itself.

In two of these enactments the exemption clause was general in character. In the Act of February 25, 1862, the exemption was general in character and declared "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United

States shall be exempt from taxation by or under state authority." The other exemption clause, general in character, is found in the Act of June 30, 1864, reading as follows:

> "And all bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

A comparison of these two general exemptions discloses that Congress broadened the exemption clause in the last enactment to include other obligations. Congress had in mind that there were other obligations which should be exempt from the taxing power of the several states in order to facilitate the borrowing of money upon the credit of the United States. It must be assumed that Congress had in mind the line of authorities beginning with *McCulloch v. Maryland, supra*, and intended to eliminate any confusion as to the extent of exemption intended.

The state of the law remained in this condition until the first session of the 43rd Congress (1873-74) authorized a revision of the Statutes of the United States.

This Congress authorized the appointment of a commission to codify the Statutes of the United States of a general and permanent nature in force on December 1, 1873. This codification resulted in what is known as the Revised Statutes and was revised and consolidated by the commissioners appointed under the Act of Congress and reprinted with amendments under authority of an Act of Congress approved March 2, 1877.

In this edition of the Revised Statutes we find:

> "Sec. 3701. All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority."

This is the reading of this section formerly known as R. S. 3701, now known as 31 U. S. C., sec. 742, except for the prefix clause which reads as follows,

> "except as otherwise provided by law."

It would seem that Congress has deliberately inserted the words "other obligations", and it is under that classification that we believe the indebtedness due from the United States Government on the contract providing for the construction of the air base in question is to be classified.

The question of the application of this section of the statute was considered in *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310, 313 (26 S. Ct. 265, 267). In this case a taxpayer sought the exemption of certain checks or orders given by the Treasurer of the United States in payment of interest accrued on United States bonds. He sought to have these checks or orders classified as obligations of the United States and thus exempt under the section of the statute here in question. This Court in commenting upon this contention admitted the application of the statute but held that the exemption claimed, "does not apply to obligations such as checks and warrants, intended for immediate use, and designed merely to stand in the place of money until presented at the treasury, and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks."

It would seem to us that this case is an authority upon the very question that is before the Court here. The balance due under this contract certainly constitutes an obligation of the United States. It is not the equivalent of money because the contractor must have some form of payment such as check or order before he can realize upon his obligation. This case just cited seems to us to decide that if the money owed by the United States Government, that is the obligation, is not presently realizable in money or its equivalent that the obligation is one entitled to the exemption prescribed in this statute.

The language used in this case by this Court indicates that the words "other obligations" includes something other than the specific evidence of indebtedness named in the statute and that it could properly consider checks, war-

rants or orders as coming within the perview of other obligations. We believe this Court has settled the question that other obligations includes any kind of indebtedness due from the United States Government which is not presently convertible into money. In the *Hibernia* case this Court held that checks, warrants and orders came within the classification of other obligations but held them subject to tax because they were the equivalent of money. In the instant case the United States owes an obligation which is not presently convertible into money, and in that lies the distinction between the *Hibernia* case and this case. The similarity, however, in this case to the *Hibernia* case lies in the fact that the obligation of the Government is something other than "stocks, bonds and treasury notes," and in the same manner by which it was decided in the *Hibernia* case that checks or orders and warrants were other obligations of the United States and that the statute was applicable to such checks, orders and warrants, so we contend the statute and the words "other obligations" is applicable to the obligation of the United States for the balance due under this contract for the construction of an air base at Savannah, Georgia.

We therefore suggest to the Court that the balance due under this contract in question here is an obligation of the United States and comes within the protection of 31 U. S. C., sec. 742.

We believe a proper interpretation of 31 U. S. C., sec. 742, should take into consideration the addition by way of prefix of the words "except as otherwise provided by law" to the old R. S. 3701 which was made when the United States Code was compiled. Congress had in mind that certain obligations of the United States by specific Acts were made subject to taxation. An illustration of this is found in the Act of Congress creating the Reconstruction Finance Corporation in 15 U. S. C., sec. 601, et seq., in which Act at section 610 we find that while Congress retained the exemption from taxation for "any and all notes, debentures,

bonds, or other such obligations issued by the corporation" * * * "both as to principal and interest from all taxation" it nevertheless otherwise provided "except that any real property of the corporation shall be subject to state, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

We believe that a proper interpretation of the intention of Congress in the enactment of this statute as it now appears in the United States Code would result in the conclusion that all obligations of the United States not excepted by some other statute of the United States are exempt under this section. That is to say that unless there is an enactment which can be classified under "except as otherwise provided by law" that any obligation of the United States is exempt from taxation under this section of the statute. Congress certainly had this in mind in enacting the law creating the Reconstruction Finance Corporation, and in the subsequent enactment of 31 U. S. C., sec. 742a, effective March 28, 1942.

II.

If So Applicable Whether There is Constitutional Authority for the Enactment.

While the question of the constitutionality of 31 U. S. C., sec. 742, has not been directly decided by this Court, it has been assumed in a number of cases that the statute is a valid exercise of the powers of Congress. Constitution Article 1, section 8, enumerates a considerable number of powers delegated to Congress, among which are "to borrow money on the credit of the United States;" and "to raise and support armies;" and "to provide and maintain a navy." The last paragraph of section 8 provides "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof."

These quoted portions of Article 1 of the Constitution of the United States, it would seem constitute adequate authority for sustaining the section here under consideration.

Hibernia Savings Society v. San Francisco, 200 U. S. 310 (26 S. Ct. 265)
State of Missouri ex rel. Missouri Ins. Co. v. Gehner, Assessor of City of St. Louis, et al., 281 U. S. 313 (50 S. Ct. 326)
East Helena State Bank v. Rodgers, 73 Mont. 210 (236 Pac. 1090)
Lantz v. Hanna, 111 Kan. 461 (207 Pac. 767)

In conclusion we respectfully submit to the Court that the obligation in question here comes within the purview of 31 U. S. C., sec. 742, and that this section is constitutional.

Respectfully submitted,

BEN H. SULLIVAN,
424 Union Trust Building,
Washington, D. C.,

JOHN H. CONNAUGHTON,
316 Metropolitan Bank Building,
Washington, D. C.,
Attorneys for Petitioners.

MORGAN S. BELSER,
Atlanta, Georgia,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM — 1944

NUMBER 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners-in-Certiorari

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of County Tax Assessors of Fulton County, and GUY MOORE, as Tax Receiver, and T. E. SUTTLES, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari

BRIEF OF RESPONDENTS-IN-CERTIORARI

E. H. SHEATS,
County Attorney
219 Hurt Building
Atlanta, Georgia

W. S. NORTHCUTT,
Assistant County Attorney
1403 C. & S. Bank Building
Atlanta, Georgia

STANDISH THOMPSON,
Attorney-at-Law
Court House
Atlanta, Georgia
Attorneys-at-Law for Comer Davis, Reese Perry and John C. Townley, as Board of County Tax Assessors of Fulton County, and Guy Moore as Tax Receiver, and T. E. Suttles, as Tax Collector of Fulton County, Georgia.

TABLE OF CONTENTS

more than others will pay more, and all who own less will pay less."

The property sought to be taxed is the intangible right of the contractors to receive from the United States Government the contract price for the work, labor and materials which "E. Jack Smith, an individual trading as E. Jack Smith, of the City of Atlanta in the State of Georgia, hereinafter called the contractor" agreed to furnish by documents appearing in the record (R. 20 and R. 32).

The incidence of the tax sought to be collected is upon the ownership by "E. Jack Smith, Contractor," a partnership, which is Petitioner-in-Certiorari, of the intangible right to receive this contract price.

The exact issue presented is whether this account receivable, privately owned and expressly subject to ad valorem tax by the laws of Georgia, enjoys an immunity because the person indebted (not the party sought to be taxed) is the United States Government.

As a basis for a proper consideration of this issue, we first present the historic and legal background for taxation in Georgia of this species of property.

2. Accounts Receivable Constitute Taxable Property and Are Subject to the Uniform Ad Valorem Tax under the Constitution and Laws of Georgia.

Attention has already been called to the fact that accounts receivable are not classified in Georgia but were expressly left by the Legislature in the great mass of unclassified property. (Section 2, Intangibles Classification Tax Act, Georgia Laws 1938, Extra Session, page 158.)

Not only are accounts receivable so taxable, but it has been the historic policy of the State of Georgia for almost a century to specify accounts receivable eo nomine as taxable property.

The present form of the General Tax Act in Georgia goes back to the Act approved January 9, 1852 (Georgia Laws 1851-2, page 288). Section II of this Act which was "An Act to Levy and Collect a Tax for each of the Political Years 1852 and 1853, and Thereafter until Repealed," provides:

> "The term 'personal estate' as used in this Act shall be construed to include all chattels, monies, debts due from solvent debtors — open accounts, goods, wares and merchandise," etc.

The 16th question contained in Section 833 of Volume I of the Code of Georgia of 1895, codified from the Act approved October 20, 1885, relating to returns of property for taxation (Georgia Laws 1884-5, page 28), required each taxpayer to answer the following question:

> "What is the gross value of your notes, accounts and other obligations for money and the market value thereof . . . ?" etc.

The 16th paragraph of questions required by Section 1087 of the Georgia Code of 1910 to be answered by taxpayers was as follows:

> "What is the gross value of the notes, accounts or other obligations for money and the market value thereof—whether the same are within or without the State?"

The Georgia Code of 1933 (which is the present Code) contains two (2) sections which refer specifically to ac-

counts receivable as taxable property in Georgia. They are the following:

Section 92-102 of the Code of 1933, defining the term "personal property" for purposes of taxation to include:

> "Monies, credits and effects, whatsoever they may be — money due on open account or evidenced by notes, contracts, bonds or other obligations secured or unsecured."

Also, question 5 of the questions required to be answered by every taxpayer in Georgia contained in Section 92-6215 of the Code of 1933, reading as follows:

> "What was the value on (January 1st) of all the notes and accounts — of every character and description owned or possessed by you?"

The recent unanimous decision of the Supreme Court of Georgia (October 8, 1943) in the case of *Colgate-Palmolive-Peet Company vs. Davis, Tax Assessor, et al.*, 196 Ga. 681, 27 S. E. 2d. 326, dealt exclusively with the taxability in Fulton County of accounts receivable and upheld the same tax now sought to be collected against an attack based upon the interstate commerce clause of the Constitution of the United States.

Directly in point is the last of the three (3) Armour Packing Company cases (*Armour Packing Company vs. Clark*, 124 Ga. 369, *Opinion 370*; 52 S. E. 145, 146, which is a unanimous decision of the Supreme Court of Georgia declaring the general tax statutes of Georgia to require the taxation in Georgia of notes and accounts owing to a non-resident conducting a business in the State.

The three sections of the Political Code of 1895 cited in this Armour Packing Company decision are identical with Sections 92-101, 92-102 and 92-105 of the current Code of 1933, except as changes have been made in Section 92-102 to incorporate the language of controlling Supreme Court decisions. The point made here is that the Supreme Court of Georgia interpreted these general tax statutes requiring taxation of all property and forbidding exemption of any, to demand the taxation of accounts receivable having a situs in Georgia.

However, the requirements of the Georgia Constitution are equally effective to require taxation of all property without resort to these special statutes.

Article VII, Section II, Paragraphs I and IV of the Constitution of 1877 (which is the present Constitution of Georgia) expressly requires the taxation in Georgia of all property and declares that "all laws exempting property from taxation other than the property herein enumerated shall be void." (Code of 1933, Sec. 2-5001 and 2-5005).

Suttles, Tax Collector vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495, 19 S. E. 2d 396, was a unanimous decision of the Supreme Court of Georgia rendered February 16, 1942, applying these particular clauses of the Constitution of Georgia to require the taxation in Georgia of credits secured by real estate.

The exact language of the Georgia Supreme Court so applying these clauses of the Constitution of Georgia to credits secured by real estate (which are intangible property) is as follows:

"Thus apart from the permitted exemptions, the

Constitution evinces an intention that no property which is subject to taxation in this State shall be relieved therefrom, and the statutes quoted express with equal certainty an intention by the law makers to lay a tax upon all property of every kind of class which the State of Georgia has jurisdiction to tax, nothing excepted." (*Opinion 193* Ga. 506, 19 S. E. 2d, p. 403, col. 2, and page 404.)

This Northwestern Mutual decision related to an ad valorem tax for the taxable years 1931-1937, inclusive. While the Classification Tax Act (Georgia Laws 1937-8, Extra Session, page 156, supra) which became effective January 1, 1938, did classify credits secured by real estate (which were the species of property involved in the Northwestern Mutual litigation), this Classification Tax Act by its terms expressly left accounts receivable where the Constitution of 1877 and *Verdery vs. The Village of Summerville*, 82 Ga. 138, 8 S. E. 213, supra, placed them, that is, in the mass of taxable property required by the Constitution and the laws of Georgia to contribute their pro-rata part to the support of the Government which gives protection to their owners.

3. THE TAXATION OF PROPERTY OF A CONTRACTOR IS NOT FORBIDDEN BECAUSE OF THE EXISTENCE OF A CONTRACT BETWEEN THE CONTRACTOR TAXPAYER AND THE UNITED STATES GOVERNMENT.

It is not easy to find controlling cases relating to the taxation of accounts receivable, because very few States have left them unclassified.

Virginia vs. Imperial Coal Sales Company, Inc., 293 U. S. 15, 79 L. ed. 171, 55 S. Ct. 12,

related in part to an ad valorem tax on accounts receiv-

able challenged as an alleged burden on interstate commerce. The following portion of the Opinion of this Imperial Coal Sales Company case illustrates the equity of the State tax claim.

> "It is not the character of the property which makes it subject to such a tax, but the fact that the property has its situs within the State and that the owner should give appropriate support to the Government that protects it. That duty is not less when the property is intangible than when it is tangible." (*Opinion* 293 U. S. 20, 79 L. ed. 175, col. 2, 55 S. Ct., p. 14, col. 1.)

In a series of controlling decisions, the Supreme Court of the United States has upheld the right of a State and its political subdivisions to levy a non-discriminatory tax upon the business or the property or the profits of a contractor engaged in the performance of a contract with the United States Government.

Most authoritative and directly in point is the unanimous decision of the Supreme Court of the United States in

> *State of Alabama vs. King and Boozer* (decided November 10, 1941) 314 U. S. 1, 62 S. Ct. 43, 86 L. ed. 3, 140 A.L.R. 615.

There the Supreme Court of the United States *reversed* a decision of the Supreme Court of Alabama which had held invalid a two (2%) per cent sales tax laid on the gross retail sales price of tangible personal property sold to King and Boozer, a partnership, contractors having a contract with the United States Government for the construction of an Army camp.

Apart from the alleged constitutional restriction, the Supreme Court of Alabama found no want of authority in the taxing statute for the collection of this tax from the contractors. The Alabama Supreme Court had held this tax invalid for two reasons, namely:

(a) Because, in the opinion of the Alabama Court, the contractors were so related by their contract to the Government's undertaking to build the camp; and

(b) because, in the opinion of the Alabama Court, the contractors were so far acting for the Government in the accomplishment of the Government purpose,

that the tax was in effect "laid on a transaction by which the United States seeks the things desired for Government purposes."

The Supreme Court of the United States reversed the judgment on certiorari and *sustained the tax*.

In order to thoroughly understand the close analogy between the facts of this Alabama contractors' case and the case of "E. Jack Smith, Contractor," it will be well to compare the pertinent facts of the Alabama case with the facts of the case at bar as outlined in Part I of the briefs filed in this case.

This Alabama case involved a tax laid upon the seller as the "taxpayer," but required to be added to the sales price and collected by the seller from the purchaser. The contract in question was a "cost-plus-a-fixed-fee" contract and the articles in respect to which the two (2%) per cent sales tax was applied were sold for use by the contractor

in constructing an Army camp for the United States. Other points of analogy are set forth most clearly in an analysis of this Alabama case in an A.L.R. note (140 A.L.R., p. 625, col. 2 and p. 626, col. 1).

The Supreme Court of the United States rejected in its entirety the following arguments there advanced by the Government:

> (1) The argument that the tax was invalid because laid in such manner that, in the circumstances of the case, its legal incidence was on the Government rather than on the contractors who ordered the lumber and paid for it.
>
> (2) The argument advanced by the Government that it was in fact the purchaser.
>
> (3) The argument advanced by the Government that the cost-plus-a-fixed-fee feature of the contract, which required the Government to reimburse the contractor for the tax resulted in an infringement of Government immunity.

In connection with this reversal of the judgment of the Supreme Court of Alabama, we respectfully call attention to the fact that the King and Boozer contract was a "cost-plus-a-fixed-fee" contract. On the contrary, nothing in the present record indicates that the additional cost to the contractor (if any) was passed on by it to the Government. Accordingly, we consider the present case of E. Jack Smith, Contractor, to be a step further removed from Government interference than the King and Boozer case in which the contract itself added every item of expense to the cost that the Government agreed to pay.

Alabama vs. King and Boozer, 314 U.S. 1, supra, which

was a unanimous decision by eight (8) Justices, cited as authority *James vs. Dravo Contracting Company*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318, to which we shall now refer.

James vs. Dravo Contracting Company sustained a tax on the gross receipts of an independent contractor while engaged in the performance of a contract with the United States Government for the construction of locks and dams for the improvement of navigation.

The Supreme Court held that such an independent contractor was not an instrumentality of the Government and that as applied to such a contractor, a non-discriminatory State tax on his gross receipts from the contract is not unconstitutional as a tax laid on the contract itself or as otherwise directly burdening the Government.

Remembering that the case now before the Court is an ad valorem tax case, the following portion of the *Opinion* in *James vs. Dravo Contracting Company* is peculiarly pertinent:

> "The question of the taxability of a contractor upon the fruits of his services is closely analogous to that of the taxability of the property of the contractor, which is used in performing the services. His earnings flow from his work; his property is employed in securing them. In both cases, the taxes increase the cost of the work and diminish his profits. Many years ago the Court recognized and enforced the distinction between a tax laid directly upon a Government contract or an instrumentality of the United States and a tax upon the property employed by an agent or contractor in performing services for the United States." (*Opinion, James vs. Dravo Con-*

tracting Company, 302 U. S. 158, 82 L. ed. 169, col. 1, 58 S. Ct. p. 218, col. 1.)

That a decision sustaining a sales or a use tax upon a contractor having a contract with the Government would be authority in an ad valorem tax case relating to a tax on the contractor's property, is further established by the unanimous decision of the Supreme Court of the United States in

Trinity Farm Construction Company vs. Grosjean, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469 (rehearing denied, 292 U. S. 604).

In this Trinity Farm Construction Company case the Supreme Court of the United States held that a contractor having contracts with the United States for the construction of river levees in a State was not a Government instrumentality. While the tax sought to be collected by Louisiana in the Trinity Farm Construction Company case was a sales or a use tax, nevertheless, the Supreme Court of the United States cited the instance of an ad valorem levy to support the use tax, the pertinent language of the Supreme Court of the United States being as follows:

> "Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power." (*Opinion 291, U. S. 472, 78 L. ed. 921, col. 2, 54 S. Ct. 470, col. 2.*) 58 S. Ct., p. 218, col. 1.

Curry vs. United States, 314 U. S. 14, 86 L. ed. 9, 62

S. Ct. 48, is likewise a *unanimous decision* relating to an Alabama excise tax of two (2%) per cent of the sale price, imposed with reference to storage, use, or other consumption in the State of tangible personal property purchased at retail by contractors having a "cost-plus-a-fixed-fee" contract with the United States. The tax was assessed in respect of a quantity of roofing which the contractors purchased outside the State and caused to be shipped to a camp site within the State of Alabama where it was used by the contractors in the performance of their construction contract with the United States Government.

Holding that the contractors "in purchasing and bringing the building material into the State and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government," the United States Supreme Court said:

> "If the State law lays the tax upon them (that is, the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through the operation of the contract. . . . the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government." (*Opinion 314*, U. S. 58, 86 L. ed. 11, 62 S. Ct. 48.)

Silas Mason Company, et al. vs. Tax Commissioner of Washington, et al. (decided December 6, 1937) 302 U. S. 186, 82 L. ed. 187, 58 S. Ct. 233, related to a State Tax

on gross receipts from construction work performed by a contractor under contract with the United States for the construction of a part of the Grand Coulee Dam and Power Plant.

Two questions were presented by the record, namely, (1) whether the tax imposed an unconstitutional burden upon the Federal Government, and (2) whether the areas in which the contractor's work was performed was within the exclusive jurisdiction of the United States.

With respect to this first question, namely, the question as to whether an unconstitutional burden was imposed on the Federal Government, the tax was sustained on authority of *James vs. Dravo Contracting Company*, 302 U. S. 134, supra.

Atkinson, et al. vs. State Tax Commission of Oregon, 303 U. S. 20, 82 L. ed. 621, 58 S. Ct. 419, related to a State income tax imposed by the State of Oregon upon the net income of Guy F. Atkinson and another, co-partners doing business as Guy F. Atkinson Company, which income was derived from work performed in the construction of the Bonneville Dam on the Columbia River under contract with the United States.

The contractor contended that the State law laid an unconstitutional burden on the Federal Government, and this contention was denied on the authority of cases cited in this section of this brief. (Opinion 303, U. S. 21, 82 L. ed. 623, 58 S. Ct. 419, col. 2.)

The Supreme Court of the United States (295 U. S. 715, 79 L. ed. 1671, 55 S. Ct. 646) *denied certiorari* to the decision of the Oregon Supreme Court in the case of *General Construction Company vs. Fisher* (1934) 149

Ore. 84, 39 P. 2d. 358, 97 A.L.R. 1252, which upheld a State excise tax of five (5%) per cent on the net income of a corporation derived from a contract with the United States Government for the construction of a dam and irrigation works in connection with the Owyhee Irrigation project. The Oregon Supreme Court decision said in the closing paragraph of this Opinion, (149 Ore. 92, 39 P. 2d 362):

> "The weight of authority would indicate that a corporation contracting with the United States or the State as an independent contractor for gain cannot claim immunity from taxation by reason of the furnishing labor and services either to the United States or the State, unless some statute specifically exempts such contractor from taxation in regard to the particular contract involved."

Upon the immediate questions presented in this case, the Supreme Court of Oregon, said:

> "The principle of immunity from State or local taxation of the property and instrumentalities of the United States is generally based upon the direct ownership or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain, even should it be used in carrying out a contract with the United States." (Opinion, 149 Ore. 90, 39 P. 2d. 361, 97 A.L.R. 1256.)

Certiorari to this Oregon decision was denied for want of a substantial Federal question. (295 U. S. 745, supra.)

Recently the Supreme Court of the United States in the case of

United States, et al. vs. Allegheny County, Pa., 321

U. S. 88 L. ed. (*Adv. Opinions*) p. 845, 64 S. Ct. 908 (decided 5-1-44)

denied the right of the State of Pennsylvania to impose an ad valorem tax upon a property of the United States Government which had been leased to Mesta Machine Company and used by it as lessee in the performance of a contract with the United States Government.

The Supreme Court of the United States called attention to the following things:

1. That the tax sought to be collected was not against the leasehold interest, *and*

2. the Court distinguished cases relating to the property or earnings of the independent contractor in the following language:

> "The trend of recent decisions has been to withdraw private property and profits from the shelter of governmental immunity but without impairing the immunity of the State or the Nation itself.
>
> "Benefits which a contractor received from dealings with the Government are subject to State income taxation. Salaries received from it may be taxed. The fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor. But, in all of these cases, what we have denied is immunity for the contractor's own property, profits or purposes." (*Opinion 64*, S. Ct. 915.)

Another ad valorem tax case was the United States Supreme Court decision (April 22, 1912) in the case of *Samuel D. Gromer, Treasurer of Porto Rico vs. Standard Dredging Company*, 224 U. S. 362, 56 L. ed. 801, 32 S. Ct. 499.

That case related to a local ad valorem tax upon machinery and boats in use in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States. The question is tersely stated in the first sentence of the Opinion of the United States Supreme Court in the following language:

> "The question in the case is the power of Porto Rico to tax certain machinery and boats which, at the time of the levy of the taxes, were in the harbor of San Juan, engaged in dredging work, in pursuance of a contract of the Standard Dredging Company with the United States Government."

Coming immediately to the point here urged by E. Jack Smith, Contractor, the United States Supreme Court said:

> "There is an allegation in the bill that the property was not 'subject to any lien or burden of taxation while being employed in the performance of its said contract with the United States of America and within the said harbor area.' It is not clear what is meant by the allegation. So far as it means that the property is an instrument of the national government, and not subject, therefor, to local taxation, the contention cannot prevail." (*Opinion 224*, U. S. 371, 56 L. ed. 805, col. 2, 32 S. Ct., p. 502, col. 2.)

Another *unanimous decision* in an ad valorem tax case is the decision of the Supreme Court of the United States in

> *Baltimore Shipbuilding and Dry Dock Company of Baltimore City vs. Mayor and Council of Baltimore* (November 28, 1904) 195 U. S. 375, 49 L. ed. 242, 25 S. Ct. 50.

This Baltimore case related to the taxability of land which formerly belonged to the United States, as a part of the property known as Fort McHenry and later conveyed to the Baltimore Dry Dock Company upon the condition that the Dry Dock Company should construct a dry dock upon the land and should "accord to the United States the right to the use forever of said dry dock at any time for the prompt examination and repair of vessels belonging to the United States," etc.

Upon the question of tax exemption of this land to the Dry Dock Company as an agent or instrumentality of the United States, the Supreme Court of the United States said in the last paragraph of the *Opinion*:

> "It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." (*Opinion* 195, U. S. 382, 49 L. ed. 245, 25 S. Ct. 52.)

4. The Tax Sought to be Collected is Non-Discriminatory.

In the second division of this argument (pages 7-11, supra), we have called attention to the fact that the tax sought to be collected is the uniform ad valorem tax required to be paid by all taxpayers subject to tax in Georgia.

With respect to non-discriminatory State taxation, the Supreme Court of the United States recently said in the case of

Oklahoma Tax Commission vs. U. S. (June 14, 1943)

319 U. S. 598, *Opinion 610*, 87 L. ed. 1612, *Opinion 1620*, 63 S. Ct. 1284, *Opinion 1289, col. 2:*

". . . Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?' The Cherokee Tobacco, supra, 11 Wall., p. 621, 20 L. ed. 227.

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves vs. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466, permitted States to impose income taxes upon government employees and *Helvering vs. Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, permitted the federal government to impose taxes on state employees. *O'Malley vs. Woodrough*, 307 U. S. 277, 59 S. Ct. 838, 83 L. ed. 1289, 122 A.L.R. 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering v. Mountain Producers Oil Corp.*, 303 U. S. 376, 58 S. Ct. 623, 82 L. ed. 907, repudiated former decisions seriously limiting state and federal power to tax. See, also, *Metcalf & Eddy vs. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384; *Jaines vs. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318. The trend of these cases should not now be reversed."

If the tax sought to be collected were a discriminatory tax imposing upon property in which the Government had an interest a rate of tax higher than imposed upon other similar property in which the Government has no interest, then the rule should be different.

Compare: *In re Kentucky Fuel and Gas Corp.*, 127 F. 2d, 656, *Opinion 660*, col. 2.

5. CASES RELATING TO INTEREST-BEARING SECURITIES DISTINGUISHED.

Petitioners-in-Certiorari have cited and rely extensively upon *Banks vs. Mayor*, 74 U. S. (7 Wall.) 16, 19 L. ed. 57, and *Weston vs. The City of Charleston*, 27 U. S. (2 Peters) 449, 7 L. ed. 481, both of which cases relate to interest-bearing securities issued by the Federal Government.

There is a sound reason for according exemption to interest-bearing securities of the Federal and State Governments and their political subdivisions. In order to interest investors in the purchase of Government securities which yield a small income and to preserve the market for these securities which, in the public interest, must be supported, courts have generally held that the principal and the income from governmental interest-bearing securities must be tax-free.

All cases recognize a material distinction between privileges which must be accorded of necessity to guarantee and to maintain the borrowing power of the Government and the Government's obligation to pay to an independent contractor the contract price for a particular job. Such a contractor, with fixed charges which include whatever liability for taxes his particular State may impose, enters into a competitive market and makes a bid to do a particular job for a particular contract price. Some contracts between contractors and the Government have incorporated a cost-plus-a-fixed-fee feature. However, it does not appear that either of the two (2) contracts signed by "E. Jack Smith, Contractor" required compensation on any cost-plus basis.

The reason why a tax should be imposed in this kind of case and why Government bonds and the income therefrom should be exempt from tax is ably expressed by the Supreme Court of the United States in *James vs. Dravo Contracting Company*, *Opinion 302, U. S. 152, 153*, in the following language:

> "... There is no ineluctable logic which makes the doctrine of immunity with respect to government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax which would operate on the power to borrow before it is exercised' (*Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673) and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit,—considerations which are not found in connection with contracts made from time to time for the services of independent contractors."

The necessity for applying this rule to "stocks, bonds and securities of the United States" is expressed by the Supreme Court of the United States in its unanimous decision in the case of

> *Bank of Commerce vs. New York City* (decided December term 1862) 67 U. S. (2 Black) 620, 17 L. ed. 451.

In this Bank of Commerce case, the Supreme Court of the United States analyzed the reason for its decision in *Weston vs. The City of Charleston* in the following language:

"The tax upon the stocks was regarded as a tax upon the exercise of the power of Congress 'to borrow money on the credit of the United States.' The exercise of this power was interfered with to the extent of the tax imposed by the city authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected the value in the market, and the free and unrestrained exercise of the power." (*Opinion 67*, U. S. 631.)

Metcalf and Eddy vs. Mitchell, 269 U. S. 514, 70 L. ed 384, 46 S. Ct. 172, related to the tax status of a contractor's compensation for services rendered to a political subdivision of a State. The Supreme Court of the United States in a unanimous decision held that the contractor's earnings were subject to Federal income tax.

With respect to this Metcalf and Eddy case and its importance as a line of demarcation between a contractor's compensation and Government securities, the United States Supreme Court in its *Opinion* in *James vs. Dravo Contracting Company*, 302 U. S. 134, *Opinion 156*, said:

"That was a pivotal decision, and we had to meet the question whether the earnings of the contractor stood upon the same footing as interest upon Government securities or the income of an instrumentality of the Government. It is true that the tax was laid upon net income. But if the tax upon the earnings of the contractor had been regarded as imposing a direct burden upon a Government agency, the fact that the tax was laid upon net income would not save it under the doctrine of *Gillespie vs. Oklahoma*, 257 U. S. 501."

6. Analysis and Classification of Types of Cases

WHERE EXEMPTION HAS BEEN ACCORDED BECAUSE OF GOVERNMENT RELATIONSHIP.

In our opinion, it will be helpful to the Court to incorporate a brief analysis which illustrates the types of cases where tax exemption has been accorded because of Government relationship and the reasons therefor.

These cases fall naturally into five (5) groups as follows:

First. Cases where the incidence of the tax is directly upon the Government.

Such cases include ad valorem tax cases levying a tax upon Government property.

United States vs. Allegheny County, 321 U. S., 88 L. ed. (*Adv. Opinions*) p. 845, 64 S. Ct. 908.

This class likewise includes sales taxes upon sales made directly to the Government.

Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, 48 S. Ct. 451, 56 A.L.R. 583.
Graves vs. The Texas Company, 298 U. S. 393, 80 L. ed. 1236, 56 S. Ct. 818.

With respect to these sales tax cases, involving sales directly to the United States, the Court's attention is respectfully called to the fact that they were either overruled, or their application restricted by the recent unanimous decision of the United States Supreme Court in the case of

State of Alabama vs. King and Boozer, 314 U. S. 1, supra.

Much controversy has existed as to whether these sales tax cases were expressly overruled or whether their ap-

plication was limited by the King and Boozer decision. (See Comment in case note 140 A.L.R., page 630.)

Second. Cases based upon special acts of Congress which, pursuant to some delegated power of Congress, has declared the particular property to be tax exempt. These cases include:

Bank vs. Supervisors, 74 U. S. (7 Wall.) 26, 19 L. ed. 60, based upon Title 31, Section 742, U. S. Code. (See Historical Note, U.S.C.A.)

Federal Land Bank vs. Crossland, 261 U. S. 374, 67 L. ed. 703, 43 S. Ct. 385, based upon the Federal Farm Loan Act of 1916.

Pittman vs. Home Owners' Loan Corporation, 308 U. S. 21, 84 L. ed. 11, 60 S. Ct. 15, 124 A.L.R. 1263, based upon the terms of the Home Owners' Loan Corporation Act (12 U.S.C., Section 1463.)

Federal Land Bank of Columbia vs. State Highway Department, 172 S. C., 174, 173 S. E. 284, based upon Title 12, U. S. Code, Section 931.

Third. Cases relating to the taxability of certificates of indebtedness, Government bonds or Government stocks and other interest-bearing securities of the Federal or the State Government, or the municipalities thereof.

Banks vs. Mayor, 74 U. S. (7 Wall.) 16, 19 L. ed. 57.

Bank of Commerce vs. New York City, 67 U. S. (2 Black) 620, 17 L. ed. 451.

Weston vs. The City of Charleston, 27 U. S. (2 Peters) 449, 7 L. ed. 481.

Pollock vs. Farmers' Loan and Trust Co., 157 U. S. 429, 39 L. ed. 759, 15 S. Ct. 673.

Fourth. Tax cases where exemption has been accorded

because of the special trust relationship between the United States and its Indian wards.

Indian Territory Illuminating Oil Co. vs. Oklahoma, 240 U. S. 522, 60 L. ed. 779, 36 S. Ct. 583.

Gillespie vs. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171.

A brief and comprehensive analysis of the tax treatment of Indian lands is found in the case of

Dewey County vs. United States (C.C.A. 8th 5-21-38), 26 F. 2d, p. 434, *Opinion* 435.

Recent comprehensive analysis by the United States Supreme Court of the nature of the guardianship exercised by the United States over its Indian wards, including the necessary tax exemption of Indian lands as a government "instrumentality", is found in the case of

Board of County Commissioners of Creek County, et al. vs. Seber, et al. (decided April 19, 1943) 318 U. S. 705, *Opinion 717*, 87 L. ed. 1094, *Opinion 1104*, 63 S. Ct. 920, *Opinion 927, col. 1.*

Fifth. The Telegraph Company decisions illustrate the distinction for which the County contends and do not constitute a separate group. Telegraph companies are authorized by special Act of Congress (Title 47 U.S.C.A., Sections 1, 2 and 3) to exercise a special franchise granted to them by the United States Government. This franchise is granted by Congress upon certain considerations whereby the Government receives from telegraph companies certain special privileges in return. As a result of this special Government franchise, the States have been forbidden to impose upon such telegraph companies a

franchise tax, which would constitute a direct tax upon their right to operate, as distinguished from property acquired as a result of such operations.

Western Union Telegraph Co. vs. Wright (C.C.A. 5th, 10-3-10) 185 F. 250.

But, even though exercising this special franchise by grant from Congress, *the real and personal property of such companies* is subject to State property taxes in the same manner as all other taxable property.

Western Union Telegraph Co. vs. Massachusetts, 125 U. S. 530, 31 L. ed. 790 8 S. Ct. 961.

Western Union Telegraph Co. vs. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 S. Ct. 1054.

Both the Taggart and Massachusetts cases relate to ad valorem taxes, which are taxes of the kind now sought to be collected in this case. They are distinguished in the Georgia case (*Western Union Telegraph Co. vs. Wright*, 185 F. 250, supra) from the franchise taxes which alone are forbidden.

7. Definition of Government Instrumentality.

From the above analysis, we arrive at the following definition of a "government instrumentality" which we believe embraces every species of property entitled to exemption under the authorities cited in the brief of either party to this case:

(1) Property which is government owned, either in its proprietary capacity or title to which is vested in the Government for some special purpose, such as its Indian wards.

(2) Property which either Congress or the State

Legislature has, pursuant to Constitutional authority, declared tax exempt.

(3) Cases relating to interest-bearing securities, or evidences of debt, issued by the Federal Government or a State government or the municipalities thereof.

Such public securities generally represent the long term or funded debt of the Government, and tax exemption is accorded of necessity to preserve the borrowing power of the Government and a market for its securities.

CONCLUSION

The tax history and authorities cited in this argument establish, in our opinion, the fact that the property of E. Jack Smith, Contractor, privately owned, is in the same class as all other unclassified property which is subject to tax according to the Constitution and laws of Georgia. The gist of the issue here presented is the fact that the property sought to be taxed is privately owned, that the tax situs for this property is Fulton County, and that the tax is not discriminatory. As pointed out in the opening paragraphs of this brief, Petitioners' statement of the issue ignores these controlling facts.

This restatement of the issue by Respondents-in-Certiorari places the emphasis where the emphasis belongs, that is, upon the private ownership of the property sought to be taxed and the contractor's obligation to pay his

equal share of the tax burden according to the Constitution and the laws of his State.

Respectfully submitted,

E. H. SHEATS,
County Attorney
219 Hurt Building
Atlanta, Georgia

W. S. NORTHCUTT,
Assistant County Attorney
1403 C. & S. Bank Building
Atlanta, Georgia

STANDISH THOMPSON,
Attorney-at-Law
Court House
Atlanta, Georgia

Attorneys-at-Law for Comer Davis, Reese Perry and John C. Townley, as Board of County Tax Assessors of Fulton County, and Guy Moore as Tax Receiver, and T. E. Suttles, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM — 1944

NUMBER 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. GORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners-in-Certiorari

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as Board of County Tax Assessors of Fulton County, and GUY MOORE, as Tax Receiver, and T. E. SUTTLES, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari

SPECIAL BRIEF OF RESPONDENTS-IN-CERTIORARI RELATING TO TITLE 31, SECTION 742 OF THE UNITED STATES CODE

E. H. SHEATS, *County Attorney*
219 Hurt Building
Atlanta, Georgia

W. S. NORTHCUTT, *Assistant County Attorney*
1403 C. & S. Bank Building
Atlanta, Georgia

STANDISH THOMPSON, *Attorney-at-Law*
Court House
Atlanta, Georgia
Attorneys-at-Law for Comer Davis, Reese Perry and John C. Townley, as Board of County Tax Assessors of Fulton County, and Guy Moore as Tax Receiver, and T. E. Suttles, as Tax Collector of Fulton County, Georgia.

TABLE OF CONTENTS

CASES CITED

CASES CITED (Continued)

UNITED STATES STATUTES AT LARGE

MISCELLANEOUS AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM — 1944

NUMBER 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners-in-Certiorari

vs.

COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as Board of County Tax Assessors of Fulton County, and GUY MOORE, as Tax Receiver, and T. E. SUTTLES, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari

SPECIAL BRIEF OF RESPONDENTS-IN-CERTIORARI RELATING TO TITLE 31, SECTION 742 OF THE UNITED STATES CODE

Title 31, Section 742 of the United States Code, with respect to which this brief was requested, reads as follows:

"Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the

United States, shall be exempt from taxation by or under State or municipal or local authority. (R.S., Sec. 3701)"

This brief and argument will be divided into the following sections:

I. Our contention that portions of those Acts of Congress from which this section of the Code is codified relate exclusively to interest-bearing securities of the United States.

II. Prior judicial interpretation of this section of the United States Code forbids its application to Georgia's attempt to levy a uniform property tax against Georgia's own citizens.

III. Any attempt by Congress to prohibit the State from levying a uniform property tax upon the State's own citizens would be an unwarranted extension of the instrumentalities rule as defined in *McCulloch* vs. *Maryland*, 17 U. S. (4 Wheat.) page 316, and accordingly unconstitutional.

IV. A recapitulation of new authorities which were cited by counsel for Respondents-in-Certiorari only on oral argument.

V. Restatement of *Second* heading on page 29 of Original Brief.

I.

Our Contention that Portions of those Acts of Congress from which this Section of the Code is Codified Relate Exclusively to Interest-Bearing Securities of the United States.

The seven (7) Acts from which this section of the United States Code is codified are listed in a historical note to Title 31, United States Code Annotated, page 356.

The substance of these acts and the portion thereof from which the Code section is derived are as follows:

(a) Act approved December 25, 1862 (12 Stat., pp. 345 and 346, Chapter 33, Section 2 of an act entitled:

> "An Act to Authorize the Issue of United States Notes and for the Redemption or Funding thereof and for Funding the Floating Debt of the United States."

Section 2 of this Act relates to provisions for funding the Treasury notes and floating debt of the United States. For that purpose, the Secretary of the Treasury was authorized "to issue on the credit of the United States coupon bonds or registered bonds—bearing interest at the rate of six per cent per annum payable semi-annually."

Only the last clause of Section 2 relates to tax exemption as follows:

> "and all stocks, bonds and other securities of the United States held by individuals, corporations or associations within the United States, shall be exempt from taxation by or under State authority."

(b) Act approved March 3, 1863 (12 Stat., pp. 709 and 710), Chapter 73, Section 1 of an act entitled:

"An Act to Provide Ways and Means for the Support of the Government."

This act authorizes the Secretary of the Treasury to borrow on the credit of the United States a sum not exceeding three hundred million dollars for the current fiscal year and six hundred million dollars for the next fiscal year and — to issue therefor coupon or registered bonds — bearing interest at a rate not exceeding six per cent per annum.

The first clause of the last sentence of Section 1 of this statute (12 Stat., p. 710) relates to tax exemption and reads as follows:

"and all bonds and Treasury notes or United States notes issued under the provisions of this Act shall be exempt from taxation by or under State or municipal authority," etc.

(c) Act approved March 3, 1864 (13 Stat. p. 13), Chapter 16, Section 8 of an act entitled:

"An Act Supplementary to an Act entitled, 'An Act to Provide Ways and Means for the Support of the Government' Approved March Third, Eighteen Hundred and Sixty-three."

This act provides:

"That in lieu of so much of the loan authorized by the Act of March Third, Eighteen Hundred Sixty-three, to which this act is supplementary, the secretary of the Treasury is authorized to borrow—on the

credit of the United States not exceeding two hundred million dollars during the current fiscal year and to prepare and issue therefor coupon or registered bonds of the United States—bearing interest not exceeding six per cent per annum payable on bonds not over one hundred million dollars annually and on all other bonds semi-annually."

The last clause of the first sentence in this section 1 (13 Stat., p. 13) relates to tax exemption and reads as follows:

"and all bonds issued under this act shall be exempt from taxation by or under State or municipal authority."

(d) Act approved June 30, 1864, (13 Stat., p. 218), Chapter 172, Sections 1 and 2 of an act entitled

"An Act to Provide Ways and Means for the Support of the Government, and for other Purposes."

This act authorized the Secretary of the Treasury to borrow on the credit of the United States four hundred million dollars and to issue therefor coupon or registered bonds of the United States—bearing interest annually not exceeding six per cent payable semi-annually.

The third sentence of Section 1 of this chapter reads as follows:

"And the Secretary of the Treasury may dispose of such bonds, or any part thereof, and of any bonds commonly known as Five Twenties remaining unsold in the United States, or if he shall find it expedient in Europe, at any time, on such terms as he may deem most advisable, for lawful money of the

United States, or at his discretion, for Treasury notes, certificates of indebtedness, or certificates of deposit issued under any act of Congress."

The last sentence of this section relates to tax exemption and reads:

"and all bonds, Treasury notes and other obligations of the United States shall be exempt from taxation by or under any State or municipal authority." (13 Stat., p. 218).

A portion of Section 2 of this act was referred to in the Act of January 28, 1865 quoted below. It authorized the Secretary of the Treasury to issue "on the credit of the United States, and in lieu of an equal amount of bonds authorized by the preceding section, and as a part of said loan, not exceeding two hundred million dollars in Treasury notes—bearing interest not exceeding the rate of seven and three tenths per cent payable to lawful money at maturity, or, at the discretion of the Secretary, semi-annually." (13 Stat., p. 218.)

(e) Act approved January 28, 1865 (13 Stat., p. 245), Chapter 22, Section 1 of an act entitled:

"An Act to Amend an Act Entitled, 'An Act to Provide Ways and Means for the Support of the Government and for Other Purposes' Approved, June Thirtieth, Eighteen Hundred Sixty-four."

This act reads in part as follows:

"That in lieu of any bonds authorized to be issued by the first section of the act entitled, 'An Act to Provide Ways and Means for the Support of the Government' approved June Thirtieth, Eighteen Hundred

Sixty-four, that may remain unsold at the date of this act, the Secretary of the Treasury may issue, under the authority of said act, Treasury notes of the description and character authorized by the second section of said act," etc.

The last clause of this Section 1 (13 Stat., p. 245) relates to tax exemption and reads as follows:

"and such notes shall be exempt from taxation by or under any State or municipal authority."

(f) Act approved March 3, 1865 (13 Stat., p. 469), Chapter 77, Section 2 of an act entitled:

"An Act to Provide Ways and Means for the Support of the Government."

This act conferred upon the Secretary of the Treasury the authority to borrow, on the credit of the United States, in addition to amounts heretofore authorized, any sums not exceeding in the aggregate six hundred million dollars and to issue bonds or Treasury notes therefor."

Section 2 of this act relates to the manner of disposition of the bonds and authorizes under certain conditions, their issuance in payment for any requisition for materials and supplies.

The last clause of this Section 2 (13 Stat., p. 469) relates to tax exemption and reads as follows:

"and all bonds or other obligations issued under this act shall be exempt from taxation by or under State or municipal authority."

(g) Act approved July 14, 1870 (16 Stat., p. 272), Chapter 256, Section 1 of an act entitled:

CASES CITED

CASES CITED (Continued)

CASES CITED (Continued)

PARAGRAPHS OF GEORGIA CONSTITUTION AND GEORGIA CODE SECTIONS CITED

GEORGIA LAWS CITED

MISCELLANEOUS AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM — 1944

NUMBER 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS and W. CORRY SMITH, partners trading under the firm name of E. JACK SMITH, CONTRACTOR,

Petitioners-in-Certiorari

VS.

GOMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as board of County Tax Assessors of Fulton County, and GUY MOORE, as Tax Receiver, and T. E. SUTTLES, as Tax Collector of Fulton County, Georgia,

Respondents-in-Certiorari

BRIEF OF RESPONDENTS-IN-CERTIORARI

PART I.

REPLY TO PETITIONERS' STATEMENT OF THE CASE

Petitioners have not clearly stated the issue, when in their brief (pages 3 and 4) they define the issue to be one of "Constitutional immunity from local taxation of open accounts when owed by the Federal Government."

We deem the issue to be an issue as to whether open accounts privately owned and otherwise subject to ad valorem tax under the Constitution and laws of Georgia enjoy a constitutional immunity because of the fact that the debtor (i.e., the person who owes the account—not the taxpayer) happens to be the Federal Government.

In our opinion, the following additional statement of facts, not clearly presented in petitioners' statement, will serve the convenience of the Court:

The equitable bill (R. 5 to 10) challenged the authority of tax officials of Fulton County to assess against the partnership ad valorem taxes for State and County purposes for the year 1942 on accounts receivable and certain certificates of indebtedness issued by the State of Georgia Highway Department.

Equitable suits in Georgia are commenced by petition to the Superior Court.

The property sought to be taxed belonged to the contractors and was owned by them on January 1, 1942, which is the effective tax date in Georgia (equitable bill, paragraph 5, R. 5).

The equitable bill alleged (paragraphs 5 and 6, R. 5 and 6) that the property sought to be taxed falls into four (4) groups as follows:

1. An account receivable owing to contractors by Camden County, Georgia, in the amount of $1,102.14.

2. An account receivable owing to contractors by the State of Georgia in the amount of $15,086.84.

3. An account receivable owing to contractors by the United States Government in the amount of $29,831.10.

4. Various certificates of indebtedness issued to contractors by the Highway Department of the State of Georgia in the amount of $117,050.68.

Petitioners' statement of "Questions Presented" in their petition for certiorari and also their statement of "Questions Presented" on page 4 of their brief each disclose that relief is sought here only with respect to the open account "due and owing by the United States of America."

Petitioners-in-Certiorari seem to recognize, as indeed they must, that the decision of the Supreme Court of Georgia is not subject to review insofar as it applies the Georgia Constitution and laws to the accounts receivable owing by the State and by Camden County, and insofar as it applies the Georgia Constitution and laws to certificates of indebtedness owing by the State Highway Department. Accordingly, the sole question presented related to the taxability of another account receivable owned on the same date by the same contractor and owing to the contractor by the United States Government.

Other Material Facts Appearing in the Record

The following material facts also appear from the record:

1. The account in question was due "for furnishing paving materials, grading, draining and laying paving materials in the construction of United States Army Air-

ports at Savannah, Georgia. (Equitable bill, paragraph 9, R. 6).

2. Paragraph 9 of the equitable bill was amended (R. 15, 16) to allege that "the work, labor and materials furnished by Petitioners (i.e., contractors) to the United States Government were furnished for the purpose and in connection with the construction of two airports or bases located at Savannah, Georgia, for the use of the United States Army." By this amendment to Paragraph 9, Exhibit B (R. 20 to 32) and Exhibit C (R. 32 to 44) were incorporated in the record and identified as the written contracts pursuant to which the contractors furnished their "work, labor and material."

3. This amendment to paragraph 9 states that the sum of $29,831.10 due Petitioners (i.e., contractors) on January 1, 1942, represented "the balance due under the terms of said contracts," and further that "the balance aforesaid was in the nature of an open account and represented an account receivable in the hands of Petitioners on said date."

4. Both contracts so attached (R. 20 to 32 and R. 32 to 44) are between "the United States of America, hereinafter called the Government, represented by the contracting officer, — and E. Jack Smith, individually, trading as E. Jack Smith, of the City of Atlanta in the State of Georgia, hereinafter called the contractor." In each case, the contract is signed by the contractor as follows: "E. Jack Smith, Contractor, 756 Hurt Building, Atlanta, Georgia."

5. The contracts appearing in the record are substantially similar, containing a description of the work to be

performed (omitting specifications and drawings, but containing a reference thereto) providing for changes, change of conditions, examination and inspection; and containing proper safeguards to the Government regarding workmanship and materials, superintendence by the contractor and delay in performance. Special articles in each contract relate to overtime compensation for laborers and mechanics, disputes and rates of wages to be paid by "the contractor or his sub-contractor," and prohibit any rebate of the weekly wages of any person employed on the work to either the contractor or sub-contractor. Article 18 of each contract requires "the contractor, sub-contractors, materialmen and suppliers" to give preference to articles manufactured and produced in the United States.

6. Article 16 of each contract (R. 28 and R. 40) contains the only reference in either contract to the time and manner of payment by the Government to the contractor of the contract price. Sub-paragraphs (c) of this Article 16 of each contract likewise contains the only reference in the record to the ownership of the property with respect to which the contractors perform their services.

This language of Sub-paragraph (c) is as follows:

> "All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of the materials and work upon which payments have been made, the restoration of any damaged work or as a

waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

7. The record does not disclose when or how title to the account receivable was transferred by E. Jack Smith, individually, designated in the contract as "contractor," to the contractor-partnership which filed the Equitable Bill.

8. The record does not disclose whether the transfer of the contract or of the contractor's right to receive the contract price was made prior to, during or after the performance by the contractor.

9. The record fails to identify the owner of the land or of the site upon which the contractor's services were performed.

PART II.

ARGUMENT AND CITATION OF AUTHORITIES

I. Analysis of Nature of the Taxes Sought to be Collected and of the Property Sought to be Taxed.

The taxes sought to be collected are the uniform ad valorem taxes to which all property in the County (other than classified property) is subject, including real estate, inventories, personal property, accounts receivable and all unclassified property.

A constitutional amendment ratified June 8, 1937, and appearing in Georgia Laws 1937, page 39, authorized the General Assembly to classify property, including money, for taxation, and to adopt different rates and different methods and different classes of such property. This amendment is now codified as a part of Section 2-5001

in the pocket part of the Annotated Code of Georgia of 1933.

Pursuant to this new constitutional authority, the Legislature of Georgia did, on December 27, 1937, enact a law (Georgia Laws 1937-8, Extra Session, page 156) classifying for taxation certain other species of property. Accounts receivable were not classified by this Act to be taxed at the reduced rates. The language of the Act (Section 2, Georgia Laws 1937-8, Extra Session, page 158) is as follows:

> "Accounts receivable and all notes except those representing credits secured by real estate are hereby classified to be taxed as heretofore provided by law and shall not be subject to the provisions of the following sections of this Act."

Accordingly, accounts receivable having been left in the mass of unclassified property, the rule with respect to their taxation is expressed by the Supreme Court of Georgia in the case of

Verdery v. The Village of Summerville, 82 Ga. 138, *Opinion 140*, 8 S. E. 213, *Opinion 214*, in the following language:

> "Once for all, the constitution has enumerated the two classes of property, which enumeration the legislature, the courts and the citizen must recognize as exhaustive; property, whatever its species, is simply exempt or subject to be taxed. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value. The result will be, in every instance, that all persons who own taxable property of equal value will pay the same amount of taxes, and all who own

An Act to Authorize the Refunding of the National Debt.

This act authorizes the Secretary of the Treasury "to issue, in a sum or sums not exceeding in the aggregate two hundred million dollars in coupon or registered bonds of the United States in such form as he may prescribe—bearing interest payable semi-annually at the rate of five per cent per annum; also a sum or sums not exceeding three hundred million dollars of bonds—bearing interest at the rate of four and one-half per cent per annum; also a sum or sums not exceeding in the aggregate one thousand million dollars of bonds—bearing interest at the rate of four per cent per annum: *all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority.*" (Italics ours.)

Such is the legislative history of all acts of Congress from which this section of the Code is derived. In each instance, the sole object of Congress was to provide exemption from taxation of interest-bearing securities or Treasury notes of the United States Government. Accordingly, as we pass to the judicial construction of this Code section, we are not surprised to find that the Courts have applied substantially the rule of ejusdem generis in defining the scope of the words "other obligations" as used in this section of the United States Code and Revenue Acts of Congress to which we shall refer.

II.

Prior Judicial Interpretation of this Section of the United States Code Forbids its Application to Georgia's Attempt to Levy a Uniform Property Tax against Georgia's Own Citizen.

The most authoritative decision on this phase of the subject was cited by counsel for Respondents-in-Certiorari on oral argument. This is the California case of

> *Hibernia Savings & Loan Society* vs. *San Francisco* (decided January 29, 1906) 200 U. S. 310, 50 L. Ed. 495, 26 S. Ct. 245.

Among the reasons why this California case is so important are that the tax involved in this California case was a property tax, the property sought to be taxed consisted of "solvent credits" and the taxpayer's defense was based exclusively on Section 3701 of the Revised Statutes, which is now codified as Title 31 of Section 742 of the United States Code.

Other points of parallel between the California case and the Georgia case now before the Court include the following:

> 1. The property assessed as "solvent credits" in the California case consisted of Treasury checks of the United States issued for interest accrued upon registered bonds of the United States. These checks were "payable at the United States Treasury at San Francisco at any time within four (4) months from their date." (Statement of Facts, 200 U. S., pp. 310 and 311.)

By comparison, the property assessed in this Georgia case now before the Court, consists of the contract price for labor, services and materials furnished by an independent contractor to the United States Government payable (as the contract provides) "as the work progresses or at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer." (R-28, 40).

2. The reason for assessment in the California case was that the Hibernia Savings and Loan Society had not presented its checks immediately for payment but had withheld them until the first Monday in March, 1899, which was the effective tax date in California.

By comparison, the reason for assessment of E. Jack Smith, Contractor, in the case at bar was the contractor's ownership on January 1, 1942 (which was the effective tax date in Georgia) of an asset which, according to the Constitution and laws of Georgia, constitutes taxable property.

3. The sole basis of the taxpayer's challenge considered by the Supreme Court of the United States was Section 3701 of the Revised Statutes (Title 31, Section 742 of the United States Code). By order of the Court, this brief is limited to a consideration of the effect of this same statute upon the account receivable assessed by Georgia tax officials.

4. The reason for the failure of the Georgia contractor to obtain his money before the effective tax date in Georgia does not appear of record. The Bill

in Equity admits ownership of the account receivable as taxable property, and this admission necessarily, as a matter of good pleading, admits that the contractor had become entitled to receive his money prior to the effective tax date and that on the effective tax date the contractor owned the credit which was assessed.

With this background of comparable facts, we respectfully call attention to the following rulings of the Supreme Court of the United States in the California case:

(a) The court held (Opinion 200 U. S. p. 316) that while the checks were "obligations of the United States" and within the letter of Section 3701 of the Revised Statutes, "they are not within its spirit, and are proper subjects of taxation."

(b) The checks in question were not intended to circulate as money and accordingly did not fall within the letter of the Act of Congress approved Aug. 13, 1894 (28 Stat. p. 278) which is codified as Sections 125 and 126 of Title 31 of the United States Code. Nevertheless, the aim and purpose of the Act of 1894 giving consent to tax circulating notes of national banking associations and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, was compared by the Court with the aim and purpose of Section 3701 of the Revised Statutes and the two Acts were construed together to permit

a State tax levied on "solvent credits" which admittedly were not within the letter of Sections 425 and 426 of Title 31 of the United States Code.

(c) The Court distinguished the following United States Supreme Court decision relating to interest-bearing securities:

Banks vs. *Mayor* 74 U. S. (7 Wall) 16, 19 L. ed. 57.

Weston vs. *City of Charleston* 27 U. S. (2 Peters) 449, 7 L. ed. 481.

Bank of Commerce vs. *New York City* 67 U. S. (2 Black) 620, 17 L. ed. 451.

Bank Tax Case (*People* vs. *Bank of Commonwealth*) 69 U. S. (2 Wall) 200, 17 L. ed. 793.

In connection with the Bank Tax Case, attention is called to the fact that subsequent to the decision in *Bank of Commerce* vs. *New York City*, 67 U. S. (2 Black) 620, supra, the New York Legislature attempted on April 29, 1863 to amend the State law so as to tax indirectly the same stocks of the United States which New York had been forbidden to tax by the direct tax previously laid.

The effect of the second decision (which was the Bank Tax case) was to hold that the new State tax on the capital of a State bank is a tax on the property of the institution, and that when that capital consists of the stocks of the United

States, such a tax is invalid. Clearly this is distinguishable from the case at bar.

(d) In the California case the Court also distinguished *Van Brocklin* vs. *Tennessee*, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670, which related to an attempt to levy a State tax on government-owned property. Again, the distinction is obvious here.

(e) *Bank* vs. *Supervisors*, 74 U. S. (7 Wall.) 26, 19 L. Ed. 60 related to an attempt to levy a State tax upon notes *issued by the Government*. Congress had power "to coin money and fix the value thereof," (Constitution, Article I, Section VIII, Clause 5). When Congress in this particular case provided for the execution of its own power by the Secretary of the Treasury, it invested these Government-issued notes with tax immunity.

We here emphasize the fact that Congress invested with tax immunity *notes issued by the Government itself*. In our opinion, there is all the difference in the world between express language granting tax exemption in an act of Congress relating to the Government's own exercise of delegated power and an effort to construe general language used in statutes relating to "ways and means for the support of the Government" and the "funding of the floating debt of the United States," so as to find in this general language authority to exempt an independent contractor whose interest in his own contract

and the property and income derived therefrom originated as, and continued to be, the contractor's separate private property."

The point we make here, in the discussion of *Hibernia Savings & Loan Society* vs. *San Francisco* is, that the Supreme Court so construed Revised Statutes, Section 3701 as to confine its operation to the spirit and purpose of the acts of Congress relating to issuance of Treasury Notes and refunding the Government debt. The section of the Code was codified from statutes so construed by the Supreme Court.

"Obligations of a Political Subdivision" Held not to Include Interest on Condemnation Award.

A well-considered District Court decision which discusses and applies *Hibernia Savings & Loan Society* vs. *San Francisco*, 200 U. S. 310, supra, is the New York District Court case of

United States Trust Company of New York vs. *Anderson, Collector of Revenue*, 60 F. 2d. 291.

The Federal Income Tax Statutes of 1926 and of 1928 designated as tax-free interest upon "the obligations of a State, territory, or any political subdivision thereof."

In holding that the liability of a city to make just compensation for condemned property was not an "obligation" of a political subdivision of the State so as to exempt interest thereon from Federal income taxation, the District Court made the following comprehensive and able analysis of the effect to be given to the word "obligation:"

"The word 'obligation' does not necessarily include every duty imposed by law, as plaintiff seems to contend. It is generic, having many meanings. When used in a statute its meaning depends upon the context and the purpose of the enactment. See *Hibernia Savings & Loan Society* vs. *City and County of San Francisco*, 200 U. S. 310, 26 S. Ct. 265, 50 L. Ed. 495.—

"There is no reason to suppose that this statutory exemption was intended to be otherwise than declaratory of the constitutional limitation upon the power of Congress to impose a tax upon an obligation of a state. The court has not been referred to any case in which the exemption has been extended to any obligation other than one to repay money borrowed by a state or a subdivision thereof. *The reason for the statutory exemption does not apply except in cases which involve the power of the government to borrow money, as a means of carrying on the governmental functions.* It has never, so far as the court knows, been extended to include interest paid by a state government on a judgment against it.

"In *Hibernia Savings & Loan Society* vs. *San Francisco*, supra, the reasoning in which applies to this case, though the facts are clearly distinguishable, it was held that checks or orders issued by the United States Treasury for interest accrued upon registered bonds of the United States, which represented obligations to pay money previously borrowed, might be taxed by a state in the hands of the owner without violating Section 3701 of the Revised Statutes (31 USCA, sec. 742) which provides that 'all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal authority.' *A ground for the decision was that the statute was one of those di-*

rected against inter-governmental taxation enacted pursuant to the constitutional immunity of state and federal instrumentalities, and that, since in this case the borrowing power of the treasury was not affected by the tax, the statute did not prohibit the tax in question. (Italics ours).

It was said on oral argument that the only case directly in point on the application of the instrumentalities rule to an account receivable is the New York State Court case of

People, ex rel. Astoria Light, Heat and Power Co. vs. *Cantor* (Court of Appeals of New York, October 2, 1923) 236 N. Y. 417, 141 N. E. 901.

In that case, which was referred to on oral argument as the "gas mask case," the Court of Appeals of New York declined to apply Section 3701 of the United States Revised Statutes because of doubt as to whether an indebtedness owing by the Government to a contractor was comprehended within its terms.

However, the New York Court felt compelled on the authority of *McCulloch* vs. *Maryland* and *Banks* vs. *New York* to hold the account receivable an instrumentality of the Federal Government.

Insofar as the New York Court refused to apply Section 3701 of the United States Revised Statutes to an open account owing by the Government to an independent contractor, the New York Court is supported by the Hibernia Savings & Loan Society case and the United States Trust Company of New York case (60 F. 2d 291, supra) which we have previously analyzed in this brief.

The New York Court's refusal to so extend the term "other obligations of the United States" is further supported by the fact that the Supreme Court has never up to this date extended the application of this section of the United States Code to any obligation outside the class of the particular obligations authorized by the Acts of Congress from which it was codified.

Nevertheless, the New York Court did hold that the account receivable there owing by the Government was exempt from tax, placing its decision upon its own interpretation of *McCulloch* vs. *Maryland* and the New York Court's conception of the implied limitation upon the State's power to tax the Federal Government or its instrumentalities. We are thus brought to the constitutional point which we are requested to discuss in this brief.

III.

Any Attempt by Congress to Prohibit the State from Levying this Uniform Property Tax upon the State's Own Citizen would be an Unwarranted Extension of the Instrumentalities Rule as Defined in McCulloch vs. Maryland, 17 U. S. (4 Wheat.) p. 316, and Accordingly Unconstitutional.

Under our system of government, Congress has only such powers as are delegated to it by the Constitution. It has no inherent powers. Within the framework of the Constitution, powers may be expressed or implied from necessity to support powers expressly conferred.

The history of the convention shows that the framers of the Constitution employed the most skillful diplomacy to bring about agreement between the Federalists who wanted a strong National Government and the "States' Rights" adherents who desired to retain a strong local government. The result, as expressed by the Supreme Court, is that:

> "The Constitution contains no express limit on the power of either a state or the national government to tax the other or its instrumentalities."

Helvering vs. *Gerhardt*, 304 U. S. 405, Opinion 411, 82 L. Ed. 1427, Opinion 1432, 58 S. Ct. 969, Opinion 971, Col. 1.

Discussing *McCulloch* vs. *Maryland*, the Supreme Court of the United States said in

> *Helvering* vs. *Gerhardt* (304 U. S. 411, supra) that it was there held "that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of National Banks, was invalid since it impeded the National Government in the exercise of its power to establish and maintain a bank—"
>
> "It was held that Congress having power to establish a bank—also had power to protect the bank by striking down State action impeding its operations; and it was thought that the State tax in question was so inconsistent with Congress' constitutional action in establishing the bank as to compel the conclusion that Congress intended to forbid application of the tax to the Federal Bank notes." (Opinion 17 U. S. (9 Wheat.) 114.)

In applying *McCulloch* vs. *Maryland* to the facts of the case at bar, we are first met with the all-important fact that in the McCulloch case Congress *in the exercise by Congress of* a delegated power had chartered the United States Bank. The tax was discriminatory in that, by the terms of the Maryland Statute, it was not applicable to a bank chartered by the Legislature of Maryland.

With this factual background, the Supreme Court of the United States laid down important principles which have become and are the origin, scope and limitation of the instrumentalities rule. Beginning on page 429 (17 U. S. (4 Wheat.) p. 429), the Court says with respect to the State's sovereign power:

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.
>
> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not—.
>
> "If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligent standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources; and

which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution."

Again, beginning on page 436 (17 U. S. (4 Wheat.) page 136), the Court says:

> "The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared—.
>
> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

Laying to one side any issue of discrimination, which admittedly is not found in the tax sought to be collected, we particularly call attention to the mutuality of the obligation of each of the two sovereignties not to encroach upon the domain of the other. We think the portions of the McCulloch decision which prohibit the taxation by Maryland of a branch of the Bank of the United States are no stronger than the portions, including the closing paragraph of the opinion above quoted, which recognize the right of Maryland to tax the interest of her own citi-

zens even in the same property. (See Opinion, 4 Wheaton, page 436.)

It is our opinion that Congress has so construed and applied the McCulloch decision, and that from its application the following rules have been clearly established:

First. Any tax upon the power of the Government to borrow money, or which restricts the market for Government securities, is held to be a tax upon the Government itself, and for that reason forbidden by *McCulloch* vs. *Maryland*.

Cases supporting this statement have been cited on page 29 of the Main Brief of Respondents-in-Certiorari.

Second. Any tax upon property which is Government owned is forbidden by *McCulloch* vs. *Maryland*.

These cases include *United States* vs. *Allegheny County* cited on page 28 to the Main Brief of Respondents-in-Certiorari and *Van Brocklin* vs. *Tennessee*, 117 U. S. 151 cited in this brief.

Third. "When the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attached to those functions when carried on by the Government itself through its departments."

Graves vs. *New York*, 306 U. S. 466, Opinion 477, 83 L. Ed. 927, Opinion 931, 59 S. Ct. 595, Opinion 597 Col. 1.

Fourth. But if the government or an officer or agent thereof, with the end in view of accomplishing the object of a power delegated to the National Government, chooses at some stage of the proceeding to let by contract to an independent contractor some portion of the work incident to the exercise of a power delegated to the Government, *McCulloch* vs. *Maryland* recognizes the right of the State to impose a tax upon the interest of its own citizen in the contract itself.

This last statement is exactly what the Supreme Court of the United States said in the closing paragraph of the Opinion in *McCulloch* vs. *Maryland* with respect to the interest which citizens of Maryland might have in the branch Bank of the United States.

The two sovereignties existing in our Federal system, as defined in *McCulloch* vs. *Maryland*, are coordinate, and the deference due by the States to the National Government in the field of delegated power is complimentary to the deference due by the National Government to the States in the field of the reserved power.

In discussing the interstate commerce clause of the Federal Constitution and its effect upon State taxation, the United States Supreme Court has several times made the statement:

> "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements."

Nashville, Chattanooga and St. Louis Railway Co. vs. *Wallace*, 288 U. S. 249, Opinion 267 & 268, 77 L. Ed. 730, Opinion 738, 53 S. Ct. 345, Opinion 350, Col. 1.

McGoldrick vs. *Berwin-White Coal Mining Co.*, 309 U. S. 33, Opinion 52, 84 L. Ed. 565, Opinion 574, 60 S. Ct. 388, Opinion 396, Col. 1.

Accordingly, in appraising the application of Section 742 of Title 31 of the United States Code and also in determining the power of Congress to restrict by acts of Congress the power of the States to tax the States' own citizens who are admittedly within the scope of the sovereign power of the States, taxes upon property and taxes upon the constituent elements of property and the rights and powers incident to ownership thereof must stand or fall together.

We are here suggesting to the Supreme Court that the reach of a decision in this case, upholding the power of Congress by Section 3701 of the Revised Statutes to enter the field of the State's right to tax the State's own citizen will not only strike down an ad valorem tax case, but for the same reasons will strike down a State sales tax or State use tax or a State income tax wherever the origin or the destination of the income received or the property sold can be traced through the contract to the United States Government.

Such an extension of the instrumentalities rule would be out of harmony with all decisions of the United States Supreme Court in cases relating to tax-

ation of independent contractors and, in our opinion, would be an invasion of State power forbidden by *McCulloch* vs. *Maryland*.

It is not necessary to cite again in this immediate connection the very large number of independent contractor cases which have been reviewed in the original brief of Respondents-in-Certiorari.

However, the case of *Metcalf and Eddy* vs. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, which related to a Federal income tax imposed upon a contractor's earnings for services rendered by the contractor to a political subdivision of a State recognizes the coordinate character and equal importance in our Federal system of the mutual deference due by each sovereignty to the other in the other's particular field. (See Opinion 269 U. S. 521, 522).

After referring to the ruling in *Fidelity and Deposit Company* vs. *Pennsylvania*, 240 U. S. 319, 60 L. Ed. 664, 36 S. Ct. 298, that "mere contracts between private corporations and the United States do not necessarily render the former essential Government agencies and confer freedom from State control," the Supreme Court in this unanimous decision said:

> "These statements we deem to be equally applicable to private citizens engaged in the general practice of a profession or the conduct of a business in the course of which they enter into contracts with the government from which they derive a profit." (Opinion 269 U. S. 525.)

Laying to one side, and not expressing any opinion upon taxes levied in such manner as to directly affect

the Government, and recognizing the fact that there might be interference with such a contract relationship by means other than taxation, the Supreme Court said (269 U. S., Opinion 526.):

> "We to decide that one who is not an officer or employee of a state, does not establish exemption from Federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state; and when we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax, on the functioning of the Government, we do not find that it impairs in any substantial manner the ability of plaintiffs-in-error (the contractors) to discharge their obligations to the state or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings."

In another unanimous decision involving a contract between an independent contractor ad the government for carriage of the United States mails, the Supreme Court sustained a gross receipts tax by the State of California upon the gross receipts of the contractor, upon the whole of which he was taxed. Two-thirds of these gross receipts were derived from carriage of the United States mails.

Alward vs. *Johnson*, 282 U. S. 509, Opinion 514, 74 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9.

IV.

A Recapitulation of New Authorities which were Cited by Counsel for Respondents-in-Certiorari only on Oral Argument.

On oral argument, when counsel for taxpayer first suggested that taxation of accounts receivable in this case was forbidden by Title 31, Section 742 of the United States Code, we replied with oral citation to the Supreme Court of *Hibernia Savings & Loan Society* vs. *San Francisco*; 200 U. S. 310, which has been analyzed in Section II of this special brief.

Also, on oral argument, we suggested to the Court that a comparison of *Alabama* vs. *King and Boozer*, 314 U. S. 1, with *Federal Land Bank of St. Paul* vs. *Bismarck Lumber Company*, 314 U. S. 95, which was decided on the same day, would show that the Supreme Court had in those cases applied the "legal incidence" test as the test of constitutionality.

In the King and Boozer case, the legal incidence of the tax was upon an independent contractor.

In the Bismarck Lumber Company case, the United States Supreme Court was dealing with a tax which the Supreme Court of North Dakota had already held was a "sales tax—laid upon the purchaser."

The United States Supreme Court accepted as controlling a North Dakota Supreme Court decision that the incidence of this North Dakota tax was "upon the purchaser." (Opinion, 314 U. S. 99.)

As the Federal Land Bank of St. Paul, the purchaser, was a corporation created by Congress to perform as an agent of the Government, or as the Government itself, a function within the scope of delegated Federal power, Congress was authorized to invest and did invest its agent with immunity from the sales tax sought to be laid upon the Federal Land Bank as purchaser in the Bismarck Lumber Company case.

Had the legal incidence of this tax been on Bismarck Lumber Company rather than the Federal Land Bank, the numerous independent contractor cases cited in our main brief disclose beyond question that the tax would have been upheld, notwithstanding the ultimate posssible increase in cost to the Government.

In closing, we respectfully suggest as an illustration another kind of contract which the Government frequently makes with citizens of the State, that is, a lease contract whereby private property is leased by a citizen of a State to the United States Government, either for a short period of time or for a term of years. Of course, the leasehold interest as Government property is exempt from tax, but the land, as the property of the citizen, pays just as much State and County tax as it did before the lease.

In a case relating to a lease, a contract exists between the United States Government and the citizen by the terms of which reciprocal rights and liabilities accrue. Although such a contract may be for a different purpose than a construction contract, it cannot, in our opinion, be distinguished from a construction contract insofar as the instrumentalities rule is concerned.

We can hardly imagine the Court holding in a given case that the connection of the Government as lessee can be *traced through the contract* and impressed upon the land of the citizen as lessor, in order to relieve the citizen from paying his fair share of ad valorem taxes upon the citizen's property. Neither can we imagine the Court holding that Congress would have authority to make so vast an extension of Federal power.

However, in our opinion, there is no constitutional distinction between an attempt by Congress to trace control through a lease contract and an attempt by Congress to trace control through a construction contract. In either case, *McCulloch* vs. *Maryland*, as we believe, requires that the State be left free to deal with its own citizen not only as to the citizen's interest in the contract itself but as to all property and all rights and powers incident to the ownership thereof and growing out of same.

V.

Restatement of Second Heading on Page 29 of Original Brief.

This study discloses that the *Second* heading on page 29 of the original brief should be amended to fit the facts of the four (4) cases there cited, in each of which the Government, or an officer of the Government, was actively executing a power conferred upon the National Government, either directly or through a corporation which the Government organized, owned and controlled for that purpose.

There is no inconsistency in this brief and any case cited on page 29 of the original brief filed by Respondents-in-Certiorari. However, the statement in the original brief as to what is held by these cases is too broad and disregards the material fact that in each case the Government was acting in exercise of its own power as distinguished from the independent contractor cases in which a different rule has been applied in every case by the United States Supreme Court.

Respectfully submitted,

E. H. SHEATS,
County Attorney
219 Hurt Building
Atlanta, Georgia

W. S. NORTHCUTT,
Assistant County Attorney
1403 C. & S. Bank Building
Atlanta, Georgia

STANDISH THOMPSON,
Attorney-at-Law
Court House
Atlanta, Georgia

Attorneys at Law for Comer Davis, Reese Perry and John C. Townley, as Board of County Tax Assessors of Fulton County, and Guy Moore as Tax Receiver, and F. E. Suttles, as Tax Collector of Fulton County, Georgia.

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1944

E. JACK SMITH, JACK CLARK, R. L. RIVERS, AND W. CORRY SMITH, PARTNERS TRADING UNDER THE FIRM NAME OF E. JACK SMITH, CONTRACTOR, PETITIONERS

v.

COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS BOARD OF COUNTY TAX ASSESSORS OF FULTON COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

CITATIONS

615694—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 23

E. JACK SMITH, JACK CLARK, R. L. RIVERS, AND W. CORRY SMITH, PARTNERS TRADING UNDER THE FIRM NAME OF E. JACK SMITH, CONTRACTOR, PETITIONERS

v.

COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS BOARD OF COUNTY TAX ASSESSORS OF FULTON COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 16, 1944, the Court entered an order requesting the Government to file, as amicus curiae, a brief "upon the questions whether 31 U. S. C. Sec. 742 is applicable to the obligation here involved, and if so applicable whether there is constitutional authority for the enactment."

I

THE SCOPE OF THE STATUTE

The statute involved (Section 3701, Revised Statutes, 31 U. S. C. 742) provides:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

The Government is of the view that this statute does not apply to the obligation here involved. According to the allegations of the original and amended petitions filed in the trial court the obligation is a sum due the petitioner from the United States in the amount of $29,831.10 under two contracts for work, labor and materials furnished in connection with the construction of two airports at Savannah, Georgia. (R. 5, 6, 15–16.) The record does not show that any conditions precedent needed to be fulfilled in order to secure payment from the Government or that anything other than the formal mechanics of payment remained to be performed. In this connection it should be observed that the allegation is that the sum represented (R. 16) "the balance due under the terms of" petitioners' contracts with the Government. It should also be noted that of the two contracts upon which the balance was due, one was approved on June 30, 1941 (R. 32) and was required to be completed within 120 days from receipt of notice to proceed (R. 21) and the other contract was approved July 12, 1941 (R. 44) and was required to be completed within 60 days from receipt of notice to proceed (R. 33). These facts support the inference which we suggest that only the

mechanics of payment remained to be completed. In this aspect of the case it is difficult to draw any distinction between the situation here presented and that involved in *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310, in which it was held that government checks, although literally obligations of the United States, were not obligations within the meaning of this statute. We do not, however, rest our view that the statute is inapplicable upon this narrow ground but upon the broader ground that obligations to pay for work or services performed, regardless of how far the obligation has ripened, are not the kind of obligations covered by the statute.

The statute is the most comprehensive of seven similar exemption provisions, all of which were included in measures providing for issuance of United States bonds or Treasury notes. All but one [1] of these acts provided only for exemption of "stocks", "bonds," or "other securities of the United States," [2] and did not contain the phrase "other obligations of the United States." The single statute which did include other "obligations" was followed in the Revised Statutes.

---

[1] Act of June 30, 1864, c. 172, 13 Stat. 218, Sec. 1.

[2] Five applied only to notes or bonds issued under the particular Act. Act of March 3, 1863, c. 73, 12 Stat. 709, Sec. 1; Act of March 3, 1864, c. 17, 13 Stat. 13, Sec. 1; Act of January 28, 1865, c. 22, 13 Stat. 425, Sec. 1; Act of March 3, 1865, c. 77, 13 Stat. 468, Sec. 2; Act of July 14, 1870, c. 256, 16 Stat. 272, Sec. 1; one applied to all bonds and securities. Act of February 25, 1862, c. 33, 12 Stat. 345, Sec. 2.

Although the Congressional records disclose no discussion of the exemption provisions, either in committee or on the floor at the time of their enactment, the question of the exemption of federal securities did receive close attention in 1894. In the meantime by the decision in *Bank* v. *Supervisors*, 7 Wall. 26, the Court had held valid the three above-mentioned exemption provisions which related to United States legal tender notes ("greenbacks"), which had been issued to help defray the cost of the Civil War and were intended to circulate as money. The City of New York had imposed a tax upon the capital of banks and included therein substantial amounts of these notes. It was urged that the notes were issued as money, that their controlling quality was that of money, and that therefore they were subject to taxation to the same extent as money.[3] The Court recognized "the force in the argument," saying (p. 30):

> Nor is it easy to see that taxation of these notes, used as money, and held by individual owners, can control or embarrass the power of the government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation

[3] It was well known that banks and individuals were using the greenbacks as a means of avoiding taxation, even shifting large quantities from state to state so that various banks had on hand on tax day large amounts of the notes. See 26 Cong. Record, Part 7, pp. 7169–7170.

but held that they were by their terms nonetheless obligations of the United States, and therefore "securities" or "notes" within the meaning of the applicable statutes. The Court further observed that although taxation of the notes would not bring the same "inconveniences as would arise from taxation of bonds and other interest-bearing obligations of the government" (p. 30), it could not be said that no embarrassment would arise from such taxation; and that it was therefore within the discretion of Congress to determine whether their usefulness, as a means of carrying on the Government, would be enhanced by exemption from taxation.

Thereafter, Congress enacted a statute[4] which provides that all legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, shall be subject to taxation as money on hand or on deposit under the laws of any state or territory. This repealed the exemption of greenbacks and ended the use of legal tender notes to avoid property taxes. The measure was vigorously debated[5] and its passage indicated, even as of that time, a Congressional policy that private advantage should not be taken of federal exemptions where the Government derived no substantial corresponding benefit, or, perhaps, more specifically,

[4] Act of August 13, 1894, c. 281, 28 Stat. 278, Sec. 1 (31 U. S. C. 425).

[5] 26 Cong. Record, Part 4, p. 3506; Part 7, pp. 7139, 7168, 7182, 7199; Part 8, pp. 7800, 8014, 8145, 8208, 8210, 8280, 8318, 8362.

that the tax exemptions of Government obligations should extend only to interest-bearing bonds and securities.

As a matter of technical construction the exemption accorded by Section 3701 applies only to interest-bearing obligations.[5] Under the rule of *ejusdem generis*, the general words "other obligations" are qualified by the nature of the preceding list of enumerated obligations, all of which are interest-bearing in character.[6] Moreover, this appears to be the construction already accorded this statutory provision by this Court in *Hibernia Savings Society* v. *San Francisco, supra.* There, an action had been begun in the California courts to recover property taxes paid under protest on two United States Treasury checks or orders, owned by the plaintiff, and which were issued to it by the Secretary of the Treasury for interest accrued upon registered bonds of the United States under Section 2698, Revised Statutes, which required the Secretary to pay any interest falling due on any portion of the public debt. The checks were payable at any time within four months from their date and were held by the plaintiff until

[5] The section refers expressly to stocks, bonds, and Treasury notes. The first two of these are clearly interest-bearing, and when read with the statute referred to in note 4, *supra*, the only Treasury notes which could be included would be of the same character.

[6] The words "other obligations" would extend, for example, to the certificates of indebtedness involved in *Banks* v. *Mayor*, 7 Wall. 16.

after the day for return of taxable property. The plaintiff urged that the checks were "obligations of the United States" and therefore exempt under Section 3701. It urged, too, that they represented interest upon Government bonds, and that the obligation of the Government to meet the interest upon its bonds would have constituted a property right which could not have been taxed under state authority. However, the claimed exemption was denied and the decision rested, at least in part, on the ground that the statute applies only to obligations issued as a means of raising money by borrowing.

A very closely analogous situation was presented in *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84,[1] which ruled that a statutory exemption from the federal income tax of interest on "obligations of the United States" was intended only to aid borrowing by the Federal Government. In that case a foreign corporation received a refund of income taxes and substantial interest. The Commissioner assessed the interest as income under a section of the Revenue Act of 1926 which provided that foreign corporations should pay tax on income derived from sources within the United States and defined such income as including "interest on bonds, notes or other interest-bearing obligations of residents, corporate or otherwise". The taxpayer claimed that the interest upon its

[1] See also *American Viscose Corp.* v. *Commissioner*, 56 F. 2d 1033 (C. C. A. 3d), certiorari denied, 287 U. S. 615.

refund was not includible under that section, or if it were, that it would be exempt under a section which excluded from gross income interest on "obligations of the United States". Both contentions were rejected. The Court held that the use of the word "obligation" in the two sections was employed with different intent: the exemption provision was intended only to aid the borrowing power of the Federal Government by making its interest-bearing bonds more attractive to investors, and was, therefore, not applicable to interest on a tax refund, while the other section was not designed to encourage loans but to produce revenue and should be construed to effect that end.

A similarly limited construction has been accorded another analogous provision exempting from income tax interest on the obligations of states or their political subdivisions, in cases which hold that interest on condemnation awards, while literally interest upon such obligations, is not within the exemption. *Kieselbach v. Commissioner*, 317 U. S. 399, 404–405.

If, as we suggest, Section 3701 applies only to obligations issued pursuant to the borrowing power, then it is plain that it does not extend to the situation here involved. In the instant case the Government was not making use of its credit to raise money or to extend the time for payment of an obligation. Indeed, the contract provided for progress payments (R. 28, 40–41) as the work proceeded and this is the very

antithesis of credit. While the contracts did empower the Government to retain 10 percent of each progress payment, the purpose of this provision was merely to insure satisfactory performance, not to grant credit to the Government.

II

THE SCOPE OF CONGRESSIONAL POWER

We understand the second question to be directed to the proposition whether Congress can extend immunity beyond the limits within which it would be implied from the Constitution, and to rest therefore upon the assumption that there is no implied constitutional immunity from the tax here involved. If we are correct in our view that the statute is inapplicable, it will be unnecessary to deal with this question. However, if the Court should disagree with our position upon the first question, then this question will have to be met. The Government's position upon this point is that Congress clearly has the power to create such an immunity. This general question was noted in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 478–479, in which the Court said:

> Whether its [Congress] power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined.

The same question was noted in the concurring opinion by Mr. Justice Frankfurter in that case (p. 492), and in *Alabama* v. *King & Boozer*, 314 U. S. 1.

We think that the power of Congress to create the suggested immunity may be rested upon the simple proposition that Congress has the implied power to do what is appropriate in the achievement of an end within its express constitutional authority. Certainly it cannot be doubted that Congress had the power to authorize the building of the air bases and the making of contracts for their construction. If Congress should consider it appropriate in order to induce contractors to take the work to declare such an immunity, we think that that legislative determination should be conclusive. So long as there is a reasonable relationship between the legislation and the end which it is designed to promote, the courts will not reexamine the Congressional decision that the statute is necessary and proper. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Logan* v. *United States*, 144 U. S. 263, 283; *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447, 473–474.

In the field of tax immunity there are other weighty considerations which in our view lead to the conclusion that the suggested power must rest with Congress. The recent decisions of this Court in the immunity field constitute recognition that the broad question of the entire relationship of the state and national governments with respect to the impact of taxation is not one which is susceptible

of satisfactory resolution by the judicial process. See *United States* v. *Allegheny County*, 322 U. S. 174, 176, 190. The problem, especially insofar as the indirect effect of state taxation upon the National Government is concerned, is one peculiarly appropriate for congressional determination. This is consistent with the latest decision in the field, *United States* v. *Allegheny County, supra,* for it recognizes the power of Congress to waive even a direct tax upon the United States. In essence, therefore, the Court has come to the view that the ultimate decision of immunity *vel non* for the National Government rests with the Congress.

The considerations entering into a determination of such problems are numerous, varied and complex. Although extension of immunity in a situation such as that here presented might deprive the states of some immediate tax revenue, that is not the end of the inquiry. Numerous benefits flow to any state in which business activity is stimulated by the National Government, not the least of which is increased tax returns. Burdens of other nature, such as a strain on police, fire, educational and other like facilities, and benefits such as acceleration in the growth of cities with attendant attractiveness to other industry, and so forth, also result. To the National Government the most immediate benefit would be in the reduction of the cost of construction and a perhaps greater readiness on the part of contractors to take its work. To assign to these and other factors values both quantitative and qualitative, to assay

them and to strike a balance between the needs and interests of state and nation, is peculiarly appropriate for the legislative process (cf. *United States* v. *Allegheny County, supra,* pp. 189–191) and it should be emphasized that the legislative determination would be made by a body representative of each and all of the states. And so if Congress should choose to grant immunity in a situation such as is here presented, that conclusion would represent the judgment of the states themselves through their own representatives as to the balance of benefit and burden. Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405, 412.

Numerous cases have expressly recognized the power of Congress to create a tax immunity which would not be implied in its silence and have extended tax immunity, in part at least, in obedience to a Congressional provision. Still other cases have denied immunity on the ground that Congress had provided none.

In *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161, it was not only assumed that such power existed in Congress but indeed the existence of the power to immunize Government contracts from state taxation was there relied upon as one of the reasons for denying that any implied constitutional immunity existed. And in *Bank* v. *Supervisors,* 7 Wall. 26, immunity for the legal tender notes (greenbacks) was rested expressly upon a statutory enactment, the Court thinking the matter to be one (p. 30) "clearly within the discretion of Congress". Although the

point was not discussed in *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, the case constitutes a flat holding that Congress may extend immuity beyond the limits of that constitutionally implied, for in that case the Court held that although there was no constitutional immunity, a statute of Congress immunized Indian lands from state estate taxation.[5]

The requirement has been stated in many cases that there must be an express provision by Congress if a purpose to exempt a private person from an otherwise constitutional tax is to be assumed. The Court sustained a general business license tax on a federal licensee because "the national government has not assumed * * * to exercise any control over the taxation * * * by the state." *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23. It sustained a tax on realty purchased with exempt benefits under the War Risk Insurance Act because "We see no token of a purpose to extend * * * immunity to permanent investments." *Trotter* v. *Tennessee*, 290 U. S. 354, 357. It overruled *Long* v. *Rockwood*, 277 U. S. 142, and sustained a state tax on copyright income in part because the Congress did not "provide that the right, or the gains from its exercise, should be free of tax." *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127. The Court upheld a state tax on unrestricted Indian allotments because any intention of Congress to exempt "should be clearly manifested,"

[5] See also *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95.

and "no exemption is clearly shown by the legislation in respect to these Indian lands." *Goudy* v. *Meath*, 203 U. S. 146, 149. Recognizing the power of Congress to exempt the property of its agents from taxation, the Court sustained such a tax because "Congress did not see fit to do so here." *Central Pacific Railroad* v. *California*, 162 U. S. 91, 125. Other cases similarly make express reference to the absence of a Congressional exemption, and, at least in part, for that reason sustain the challenged tax. *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323–324; *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310, 315–316; *Plummer* v. *Colex*, 178 U. S. 115, 134–135; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, 548; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592; *National Bank* v. *Commonwealth*, 9 Wall. 353, 363.

CONCLUSION

We think that Section 3701, Revised Statutes, does not apply to the obligation here involved but that Congress has constitutional power to declare such an immunity.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

OCTOBER, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1944.

E. Jack Smith, Jack Clark, R. L. Rivers and W. Corby Smith, partners trading under the firm name of E. Jack Smith, Contractors, Petitioners,

vs.

Comer Davis, Reese Perry and John C. Townley, as Board of County Tax Assessors of Fulton County, et al.

On Writ of Certiorari to the Supreme Court of the State of Georgia.

[December 4, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioners are partners engaged in the contracting and construction business. They claim that on January 1, 1942, the United States owed them a balance of $29,831.10. This amount was due under the terms of two contracts for work, labor and materials furnished in connection with the construction of two airports for the use of the United States Army. Petitioners state that this balance "was in the nature of an open account and represented an account receivable" in their hands.

The respondent tax officials of Fulton County, Georgia, sought to assess this open account for state and county ad valorem tax purposes.[1] Petitioners brought this action in a state court to enjoin such assessment, claiming that the open account was an instrumentality of the United States and hence was immune from state or county taxation. The Supreme Court of Georgia overruled the trial court's dismissal of respondents' general demurrer and directed that the petition be dismissed. 197 Ga. 95, 28 S. E. 2d 148. We granted certiorari because of the important constitutional and statutory problems inherent in the case.

I. Petitioners claim that the proposed tax on the open account claim against the United States is a tax upon the credit of the

[1] Georgia Code (1933) § 92-101 subjects all real and personal property to taxation, except as otherwise provided by law, and § 92-102 includes within the definition of personal property "money due on open account or evidenced by notes, contracts, bonds, or other obligations, secured or unsecured."

federal government and upon its power to raise money to carry on military and civil operations. Hence, it is argued, such a tax is unconstitutional under the rule, first enunciated in *McCulloch* v. *Maryland*, 4 Wheat 316, that without Congressional action there is immunity from state and local taxation, implied from the Constitution itself, of all properties, functions and instrumentalities of the federal government.[2] We think otherwise.

In the first place, an open account claim against the United States does not represent a credit instrumentality of the federal government within the meaning of this constitutional immunity. The record here reveals only that petitioners claim that the United States owes them $29,831.10, which amount is carried by them as an account receivable and "is in the nature of an open account." There are the usual provisions of standard form government construction contracts calling for progress payments by the United States, with final payment being made after completion and acceptance of the work. There is no evidence of any bargaining for a credit extension of $29,831.10 or any provisions for the payment of interest on amounts due under the contracts. Nor is there any indication that any conditions precedent needed to be fulfilled or that, on the supposition that the amount was conceded to be correct by the United States, anything other than the formal mechanics of payment needed to be performed. We can only assume, therefore, that this is an ordinary open account as generally defined in the commercial world.[3] In other words, it is an unsettled claim or demand made by the creditor which appears in his account books. It is not evidenced by any written document whereby the United States, the debtor, has promised to pay this claim at a certain time in the future; nor is there any binding acknowledgement by the United States of the correctness of the claim. Conceivably the amount claimed to be due is incorrect or is subject to certain defenses or counterclaims by the United States, necessitating further settlement or adjustment. Such a unilateral, unliquidated creditor's claim, which by itself does not bind the United States and which in no way increases or affects the public debt, cannot be

[2] People *ex rel.* Astoria L. H. & P. Co. v. Cantor, 236 N. Y. 417, is cited in support of this argument.

[3] See Patop, Accountants' Handbook 229.30 (2d ed., 1934); Olson and Hallman, Credit Management 36 (1925); Jamison, Finance 56 ff (1927); Kramer v. Gardner, 104 Minn. 370, 373.

said to be a credit instrumentality of the United States for purposes of tax immunity.

In these respects a mere open account claim differs vitally from the type of credit instrumentalities which this Court, in the past has recognized as constitutionally exempt from state and local taxation.[4] Such instrumentalities in each instance have been characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specified dates and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay. Thus in *The Banks* v. *The Mayor*, 7 Wall. 16, immunity was granted to interest-bearing certificates of indebtedness issued to public creditors pursuant to the Act of March 1, 1862, 12 Stat. 352, and the Act of March 17, 1862, 12 Stat. 370. United States stock, bearing interest of 6% and 7%, issued pursuant to the Act of April 20, 1822, 3 Stat. 663, was declared immune in *Weston* v. *Charleston*, 2 Pet. 449. See also *Bank of Commerce* v. *New York City*, 2 Black 620, holding immune interest-bearing stock of the United States authorized by various acts of Congress,[5] and *Bank of the Commonwealth* v. *Commissioner of Taxes*, 2 Black 635, note, declaring immune United States stock, bearing not over 5% interest, authorized by the Act of June 14, 1858, 11 Stat. 365. Interest-bearing bonds of the federal government authorized by law have consistently been held immune from state and local taxation. See, for example, *Home Savings Bank* v. *Des Moines*, 205 U. S. 503. None of these cases is authority for placing an open account claim under the protective umbrella of constitutional immunity.

It is clear, moreover, that the proposed taxation of this open account will not affect or embarrass in any substantial measure the power of the United States to secure credit or to secure aid from independent contractors for necessary military and civil con-

[4] In Bank v. Supervisors, 7 Wall. 26, this Court held that Congress had the constitutional power, and exercised it, to exempt non-interest-bearing United States legal tender notes, called "greenbacks." The decision did not rest on a finding that these notes were constitutionally exempt in and of themselves. Congress thereafter enacted a statute which in effect reversed this decision and allowed such notes to be taxed by states. Act of Aug. 13, 1894, 28 Stat. 278, Sec. 1, 31 U. S. C. § 425.

[5] This case involved stock issued under the Act of April 15, 1842, 5 Stat. 473, the Act of Jan. 26, 1847, 9 Stat. 118, the Act of March 31, 1848, 9 Stat. 217, and the Act of Feb. 8, 1861, 12 Stat. 129.

struction projects. The tax here is a uniform, non-discriminatory levy upon an unliquidated asset of the creditor and not upon a credit instrumentality of the United States. That this asset involves a claim against the federal government is no more fatal to the validity of the tax than the fact that in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, the tax was levied on the contractor's gross receipts from the United States or the fact that in *Alabama* v. *King & Boozer*, 314 U. S. 1, the sales tax was placed on the sale of property to a contractor for use in a federal government project. The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned. They too must bear their fair share of the tax burden. And as long as that burden is non-discriminatory, there is no basis for assuming that contractors will be any less willing to enter into construction contracts with the United States. Nor is such a tax likely to affect or impair in any way their ability to discharge their duties efficiently. There is thus no practical reason for immunizing open accounts of this nature from taxation.

II. The claim that an open account is an obligation exempt from taxation under the provisions of Section 3701 of the Revised Statutes, 31 U. S. C. § 742, is also without merit. Congress by this section has provided that "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." The plain meaning of these words and their legislative background dispel any doubt as to their inapplicability to an open account claim of a creditor of the United States.

Section 3701 on its face applies only to written interest bearing obligations issued pursuant to Congressional authorization. Stocks, bonds and Treasury notes[6] are obviously of that nature. And, under the rule of *ejusdem generis*, it is reasonable to construe the general words "other obligations," which allegedly cover open accounts, as referring only to obligations or securities of the same type as those specifically enumerated. *Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310. Cf. *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84. This interpretation is in accord with the long

[6] The only Treasury notes that could be included within Section 3701 are interest bearing ones, in light of the provisions of the Act of Aug. 13, 1894, 28 Stat. 278, Sec. 1, 31 U. S. C. § 425, allowing notes and certificates payable on demand and circulating as currency to be taxed by the states.

established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. It is unnecessary to extend such tax exemption, at least through statutory interpretation, to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes. Tax exemptions being the exception rather than the rule, much clearer language evidencing an intent to immunize open account claims under Section 3701 is necessary under these circumstances.

The seven statutory exemption provisions[7] from which Section 3701 was derived further confirm the conclusion that Congress at no time intended to exempt open account claims. In all seven instances the exemption provisions appeared in statutes authorizing the issuance of interest-bearing bonds or Treasury notes. Five of the seven statutes specifically limited tax exemptions to the securities issued under those enactments; one extended exemption to "all stocks, bonds and other securities of the United States;"[8] and the other granted exemption to "all bonds, Treasury notes, and other obligations of the United States."[9] Thus, if the rule of

---

[7] (1) Act of Feb. 25, 1862, 12 Stat. 345, 346, exempting "all stocks, bonds, and other securities of the United States;" (2) Act of March 3, 1863, 12 Stat. 709, 710, exempting "all the bonds and treasury notes or United States notes issued under the provisions of this act;" (3) Act of March 3, 1864, 13 Stat. 13, exempting "all bonds issued under this act;" (4) Act of June 30, 1864, 13 Stat. 218, exempting "all bonds, treasury notes, and other obligations of the United States;" (5) Act of Jan. 28, 1865, 13 Stat. 427, exempting "such notes" as were issued under the statute in lieu of bonds; (6) Act of March 3, 1865, 13 Stat. 468, 469, exempting "all bonds or other obligations issued under this act;" (7) Act of July 14, 1870, 16 Stat. 272, exempting "all of which said several classes of bonds [authorized to be issued under the Act] and the interest thereon."

[8] Act of Feb. 25, 1862, 12 Stat. 345, 346. This has been described in Congress as embracing "simply the public securities, such as are described as the permanent debt of the Government." Cong. Globe, p. 3184, 38th Cong., 1st Sess.

[9] Act of June 30, 1864, 13 Stat. 218. This provision comes closest to the wording of Section 3701. In speaking of the term "other obligations," Rep. Hooper said during the Congressional debates on the Act that "I understand, however, that this provision applies only to the interest-bearing obligations of the Government." Cong. Globe, p. 3183, 38th Cong., 1st Sess. He also stated that the committee in charge of the bill which eventually became law "found the general practice since the commencement of the Government had been to exempt from taxation the obligations of the Government issued by the United States under loan bills." *Ibid.*

This Act, moreover, obviously used the word "obligation" throughout to refer to written documents, making provisions relating to counterfeiting, altering, printing and photographing them. And in Section 13, the Act defined

ejusdem generis be applied to the two latter provisions, all seven exemptions were limited by their terms to interest-bearing securities or obligations authorized by Congress, for the payment of which the credit and faith of the United States was pledged. Full effect must also be given to the subsequent statutory provision allowing states to tax "legal tender notes and other notes and certificates of the United States payable on demand and circulating or intended to circulate as currency."[10] All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government. That intent, which is largely codified in Section 3701, should not be expanded or modified in any degree by the judiciary.

The judgment of the Supreme Court of Georgia is affirmed.

Affirmed.

---

the words "obligation or other security of the United States," as used in this Act, to include and mean "all bonds, coupons, national currency, United States notes, treasury notes, fractional notes, checks for money of authorized officers of the United States, certificates of indebtedness, certificates of deposit, stamps, and other representatives of value of whatever denomination, *which have been or may be issued under any act of Congress.*" (Italics added.)

[10] Act of Aug. 13, 1894, 28 Stat. 278, Sec. 1, 31 U. S. C. § 425. See notes 4 and 6, *supra*.